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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1942

No. 236

THE UNITED STATES OF AMERICA, ON RELATION OF SAMUEL OSTRAGER AND SAMUEL OSTRAGER, IN HIS OWN BEHALF, PETITIONERS,

vs.

NEW ORLEANS CHAPTER, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 15, 1942.

CERTIORARI GRANTED OCTOBER 12, 1942.

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UNITED STATES OF AMERICA.

DISTRICT COURT OF THE UNITED STATES, EASTERN DISTRICT OF LOUISIANA, NEW ORLEANS DIVISION.

No. 259 (Civil Action).

UNITED STATES OF AMERICA ON RELATION OF SAMUEL OSTRAGER AND SAMUEL OSTRAGER IN HIS OWN BEHALF,

versus

NEW ORLEANS CHAPTER, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., ET AL.

Appearances:

Messrs: Alexander H. Schullman; Orloff & Katz, and Katz and Amato,
Attorneys for Plaintiffs-Appellants-Appellees.

Messrs: Deutsch & Kerrigan, (R. Emmett Kerrigan),
Attorneys for Defendants-Appellees-Appellants.

APPEALS from the District Court of the United States for the Eastern District of Louisiana, to the United States Circuit Court of Appeals for the Fifth Circuit, returnable within forty (40) days from the 10th day of March, 1941, (Plaintiff's notice of appeal), and the 31st day of March, 1941, (Defendant's notice of appeal), respct. at the City of New Orleans, Louisiana.

Extension of time granted by the Honorable United States District Court, Eastern District of Louisiana, bringing the return day up to and including May 19th, 1941. (Plaintiff's extension).

COMPLAINT.

Filed February 1st, 1940.

In the District Court of the United States for the Eastern District of Louisiana, New Orleans Division.

United States of America on relation of Samuel Ostrager and Samuel Ostrager in his own behalf,

vs. Civil Action No. 259.

New Orleans Chapter, Associated General Contractors of America, Inc., a Louisiana Corporation, W. Horace Williams Co., Inc., a Louisiana Corporation, Doullut and Ewin, Inc., a Louisiana Corporation, R. P. Farnsworth & Co., Inc., a Delaware Corporation, Herman T. Makofsky, Lionel F. Favret, Henry Boh, Arthur P. Boh, Summa Caldwell, Monte E. Hart, Theodore A. Pittman, Olin J. Farnsworth, W. Horace Williams, James P. Ewin, John V. Burkes, Robert T. Burkes and Arthur Lagarde.

United States of America on relation of Samuel Ostrager and Samuel Ostrager, in his own behalf, plaintiffs above named, bring this civil action against New Orleans Chapter, Associated General Contractors of America, Inc., et al., defendants above named on a cause of action whereof the following is a statement:

1. Samuel Ostrager, the relator, is a citizen of the United States, residing in the City of Huntington Park, County of Los Angeles, State of California and that he institutes and prosecutes this action in the name of and for and on behalf of The United States of America and in his own behalf under and in pursuance of the statutes of the United States in such cases made and provided by reason of Sections 231, 232, 233, 234 and 235 of Title 31 of the United States Code Annotated.

2. The defendants, Herman T. Makofsky, Lionel F. Favret, Henry Boh, Arthur P. Boh, Summa Caldwell, Monte E. Hart, Theodore A. Pittman, Olin J. Farnsworth, W. Horace Williams, James P. Ewin, John V. Burkes, Robert T. Burkes, Arthur Lagarde, are citizens of the United States and residents of the Parish of Orleans and State of Louisiana, and that at all times hereinafter mentioned said defendants were and still are such citizens and residents and subject to the provisions of the Laws of the United States.

3. That at all times hereinafter mentioned, New Orleans Chapter, Associated General Contractors of America, Inc., W. Horace Williams Co., Inc. and Doullut & Ewin, Inc., defendants above named were and now are corporations duly organized and existing under and by virtue of the laws of the State of Louisiana, having their respective principal places of business in New Orleans, Louisiana, and at all times hereinafter mentioned R. P. Farnsworth & Co., Inc. was and is a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, having its principal place of business in New Orleans, Louisiana.

4. That during all or part of the time hereinafter mentioned, the above named corporations and persons were engaged in the business of general contracting, carrying on business in and about said New Orleans, Louisiana and were members of said New Orleans Chapter, Associated General Contractors of America, Inc., that is to say:

Summa Caldwell, Verne Caldwell and Monte E. Hart, were and are partners doing business as Caldwell Bros. & Hart; Henry Boh, Arthur P. Boh and Arthur Lagarde were and are partners doing business as Boh & Lagarde;

Robert T. Burkes and John V. Burkes were and are partners doing business as Burkes Bros.; Theodore A. Pittman, Houston C. Pittman and Everett Pittman were and are partners doing business as Pittman Bros. Construction Co., Olin J. Farnsworth was said and is the manager of R. P. Farnsworth & Co., W. Horace Williams was and is the manager of W. Horace Williams Co., Inc., James P. Ewin was and is the manager of Doullut & Ewin, Inc., Herman T. Makofsky operated as a general contractor under his own name, Lionel F. Favret operated as a general contractor under his own name.

5. The defendants at all times hereinafter mentioned were not and are not in the military or naval forces of the United States or in the militia called into or actually employed in the service of the United States.

6. The acts of the defendants above named and each of them were done by the defendants in contravention and violation of the provisions of the laws and statutes of the United States, and more particularly the following:

"Sec. 80. (Criminal Code, section 35, amended.) Presenting false claims; aiding in obtaining payment thereof. Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, any claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious, or fraudulent; or whoever, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, or for the purpose and with the intent of cheating and

swindling or defrauding the Government of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, shall be fined not more than $10,000 or imprisoned not more than ten years, or both. (R. S. Sec. 5438; May 30, 1908, c. 235, 35 Stat. 555; Mar. 4, 1909, c. 321, Sec. 35, 35 Stat. 1095; Oct. 23, 1918, c. 194, 40 Stat. 1015.)"

Sec. 80—Title 18—U.S.C.A.

"Sec. 83. (Criminal Code, section 35, amended.) Conspiracy to defraud United States in regard to allowance or payment of false claims. Whoever shall enter into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim, shall be fined not more than $10,000 or imprisoned not more than ten years, or both. (R. S. Sec. 5438; May 30, 1908, c. 235, 35 Stat. 555; Mar. 4, 1909, c. 321, Sec. 35, 35 Stat. 1095; Oct. 23, 1918, c. 194, 40 Stat. 1015.)"

Sec. 93—Title 18—U. S. C. A.

7. That for the purposes of relieving destitution, providing relief, creating and increasing employment, expediting a Public Works program and providing for work

upon and construction of useful Public Works and projects, the Congress of the United States enacted the following named Acts and Joint Resolutions, to-wit:

The Emergency Relief Appropriation Act of 1935, Supplemental Appropriation Act fiscal year 1936 and the First Deficiency Appropriation Act of 1936;

And pursuant to such Acts and Resolutions and to the orders and rules promulgated under their authority, certain sums of money were appropriated for the purposes declared in such Acts and Resolutions, and out of said sums of money there were allocated certain sums of money to aid in the construction of certain buildings in the City of New Orleans, Louisiana for the Board of Administrators of the Charity Hospital of Louisiana at New Orleans, and particularly, the foundation for the Main Building of the said Charity Hospital, said project being known as Docket Number 4529 R and 4529 D.

8. That for the purpose of aiding said project, a grant of money not to exceed $715,380 was made by the United States of America through the Federal Emergency Administration of Public Works (commonly referred to as the Public Works Administration) to the Board of Administrators of the Charity Hospital of Louisiana at New Orleans.

9. That for the purpose of letting the contracts for the construction work in connection with said project the Board of Administrators of the Charity Hospital of Louisiana at New Orleans advertised and called for bids from persons, including the defendants herein, seeking to obtain construction contracts for the preformance of the work called for by said project.

10. That the defendants above named throughout a period of time beginning on or about January 6th, 1937 and continuing each and every day thereafter until on or about August 20th, 1937 in the Parish of Orleans, State of Louisiana and elsewhere did knowingly, wilfully, unlawfully and feloniously conspire, combine, confederate, agree and have a tacit understanding together and with each other, and with divers other persons unknown to the United States and your relater, plaintiffs above named; to defraud and otherwise injure and damage the United States as is more particularly set forth hereinafter.

11. That is pursuance of said conspiracy the defendants did on January 6th, 1937 at New Orleans, Louisiana adopt a resolution at a regular meeting of the members of the defendant, New Orleans Chapter, Associated General Contractors of America, Inc., requiring each member to add to the amount of each bid thereafter offered and submitted by him, the association fees then in force, regardless of whether such bid was on construction work for Federal or State Governments or otherwise.

12. That in pursuance of such conspiracy on April 12th, 1937 at New Orleans, Louisiana, Herman T. Makofsky, Lionel F. Favret, R. P. Farnsworth & Co., Inc., W. Horace Williams Co., Inc., Doullut & Ewin, Inc., Caldwell Bros. & Hart, Boh & Lagarde, Burkes Bros., Pittman Bros. Construction Co. entered an agreement that they would add in excess of $7,500, representing estimating, quantity survey and chapter fees of all bidders on the contract for the foundation work for the Main Building of the Charity Hospital at New Orleans, Louisiana, and further agreed that the successful bidder would pay such excesses to the New Orleans Chapter, Associated General Contractors of America, Inc. for the use and benefit and to be distributed to the defendants and the said New

Orleans Chapter, Associated General Contractors of America, Inc.

13. That in pursuance of said conspiracy in the Parish of Orleans in the New Orleans Division of the Eastern District of Louisiana, and within the jurisdiction of the Court, the defendants did knowingly, wilfully and unlawfully and with intent to defraud the United States, divert, attempt to divert and assist in diverting for the benefit of the said defendants and W. F. Jackson Co., certain monies allocated out of an appropriation under the authority of the Emergency Relief Appropriation Act of 1935, Supplemental Appropriation Act fiscal year 1936 and the First Deficiency Appropriation Act of 1936 for the purpose of constructing certain buildings in the City of New Orleans, Louisiana, for the Board of Administrators of the Charity Hospital of Louisiana at New Orleans, to-wit: The foundation for the Main Building of the said Charity Hospital, said project being known as Docket Number 4529 R and 4529 D, the cost of which project was financed in part out of appropriations aforesaid by the Federal Emergency Administration of Public Works, an Agency of the United States of America, the said defendants and W. F. Jackson Co. being then and there persons not entitled to any benefit under the provisions of the said Emergency Relief Appropriation Act of 1935, Supplemental Appropriation Act fiscal year 1936 and the First Deficiency Appropriation Act of 1936, that is to say, that they, the said general contractors, being the only bidders on the project aforesaid did wilfully and unlawfully add to their individual bids, which were to be submitted in connection with the project aforesaid prior to their submission certain agreed amounts which were composed of sums, portions of which were to be collected and were collected by the successful bidder out of the appropriations aforesaid and were to be paid and

were paid by the successful bidder to the New Orleans Chapter, Associated General Contractors of America, Inc., and by said Chapter distributed to the said defendants and W. F. Jackson Co., all for the purpose and with the intent of obtaining funds from the said allocation and appropriation of monies aforesaid for the use and benefit of the defendants and W. F. Jackson Co., persons not entitled thereto, and to the damage of the United States, that the bids submitted, which included the excess amounts which the defendants and W. F. Jackson Co. agreed to add to their individual bids were as follows:

R. P. Farnsworth & Co., $715,380.

Doullut & Ewin, Inc., $885,000.

Herman T. Makofsky, $905,350.

Lionel F. Favret, $908,000.

W. Horace Williams & Co., Inc., and Caldwell Bros. & Hart, $773,113.

Boh & Lagarde, $894,400.

Burkes Bros., $904,900.

Pittman Bros. Construction Co., $959,740.

14. That the defendants above named in carrying out the said conspiracy falsely and fraudulently executed and delivered or caused to be executed and delivered certain certificates containing substantially the following:

"The undersigned hereby certifies that this Proposal is genuine and not sham or collusive, or made in the inter-

est or in behalf of any person, firm or corporation not herein named, and that the undersigned has not, directly or indirectly, induced or solicited any other bidder to submit a sham bid, or any other person, firm or corporation to refrain from bidding, and that the undersigned has not in any manner sought by collusion to secure for himself an advantage over any other bidder.

Firm name: .....
By: .....
Title: .....
Official Address: ....."

which certificates were false, fraudulent and fictitious and made for the purpose and with the intent of cheating and defrauding the Government of the United States.

15. That pursuant to the aforesaid conspiracy and in furtherance thereof, all of the aforesaid defendants through the fraudulent and unlawful conduct hereinbefore described, did falsely and fraudulently submit bids in furtherance of said conspiracy, did falsely and fraudulently receive awards and enter into said construction contract in furtherance of said conspiracy, did submit false and fraudulent written claims for payment thereof, did falsely and fraudulently receive from the United States Government large sums of money, and did make or cause to be made false and fraudulent statements or representations in regard to said bids and their claims thereon, and did make or use or cause to be made or used false and fraudulent certificate or certificates knowing the same to contain false and fraudulent or fictitious statements or entries for the purpose and with the intent of cheating and defrauding the Government of the United States, and that the Government of the United States was cheated and defrauded and sustained damages thereby in the amount of $7,620.

Wherefore, plaintiffs demand judgment against the said defendants in the sum of Fifteen Thousand Two Hundred Forty and No/100 ($15,240.00) being double the amount of damages sustained by the United States as above set forth, or such sum that the Court may find, together with interest thereon in such cases made and provided; and

That the Court enter judgment against the defendants and each of them for the sum of Two Thousand ($2,000.00) Dollars for the violation hereinbefore set forth as aforesaid in such cases made and provided.

That the Court enter judgment against the defendants for the cost of this suit.

Plaintiffs demand a jury trial.

ALEXANDER H. SCHULLMAN,
ORLOFF & KATZ;
By: JOE ORLOFF,
Attorneys for Plaintiffs.

ALEXANDER H. SCHULLMAN and
ORLOFF & KATZ,
415 Chester Williams Building,
Los Angeles, California.

9

ANSWER.

Filed July 18th, 1940.

To the Honorable Judges of the District Court of the United States in and for the Eastern District of Louisiana, New Orleans Division:

Now into Court, through undersigned counsel, come New Orleans Chapter, Associated General Contractors of

America, Inc., Doullut & Ewin, Inc., R. P. Farnsworth & Company, Inc., W. Horace Williams Company, Inc., Arthur P. Boh, Henry Boh, Burkes Bros., John V. Burkes, Robert T. Burkes, Caldwell Bros. & Hart, Summa Caldwell, Verne Caldwell, Monte E. Hart, James P. Ewin, Olin J. Farnsworth, Lionel F. Favret, Pittman Bros. Construction Company, Theodore A. Pittman, Houston C. Pittman, Everett Pittman, Herman T. Makofsky and W. Horace Williams, made defendants herein, and for answer to the complaint filed herein, say:

For a First Defense.

The complaint fails to state a claim against defendants upon which relief can be granted.

For a Second Defense.

On December 2, 1939, defendants herein were indicted under two counts by a Grand Jury of the United States District Court in and for the Eastern District of Louisiana, New Orleans Division, for the same alleged offense which forms the basis of the instant complaint. The aforesaid criminal proceeding bears No. 19,843 on the Criminal Docket of this Court. Thereafter, the first count of said indictment was nolle prosequied, and while the second count charged no offense against defendants, or, if it did, defendants were in no event guilty thereunder, a plea of nolo contendere was entered by defendants thereto in order to avoid the expense, difficulties and inconvenience of protracted litigation. On or about January 15, 1940, fines were levied against each of defendants on the second count of said indictment. Said judgment and fines operate as a bar to the instant proceeding under the Fifth Amendment to the Constitution of the United States.

For a Third Defense.

I.

Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations concerning plaintiff's citizenship and residence contained in paragraph I of the complaint. Defendants deny the truth of the remaining allegations of said paragraph.

II.

Defendants admit the truth of the allegations contained in paragraph II of the complaint.

III.

Defendants admit the truth of the allegations contained in paragraph III of the complaint.

IV.

Defendants aver that the partnership of Boh & Lagarde was dissolved shortly after it submitted its bid on the project referred to in the complaint, and that immediately thereafter Henry Boh and Arthur Boh continued to do business under the name of Boh Brothers Construction Company. Defendants further aver that said Boh & Lagarde, and said partners thereof, were never members of defendant New Orleans Chapter, Associated General Contractors of America, Inc., and that W. Horace Williams Company, Inc., and W. Horace Williams are not members at the present time. Except as herein denied, defendants admit the truth of the allegations contained in paragraph IV of the complaint.

V.

Defendants admit the truth of the allegations contained in paragraph V of the complaint.

VI.

Defendants deny the truth of the allegations contained in paragraph VI of the complaint.

VII.

Defendants deny the truth of the allegations contained in paragraph VII of the complaint, except as may be admitted herein. Defendants aver that the Acts, Joint Resolutions, Orders and Resolutions alleged in said paragraph speak for themselves. Defendants admit that the Board of Administrators of the Charity Hospital of Louisiana at New Orleans, received certain funds from the Federal Emergency Administration of Public Works to aid it in the construction of certain buildings in the City of New Orleans, Louisiana, including the foundation for the main building of the said Charity Hospital.

VIII.

Defendants are without knowledge or information sufficient to justify a belief in the truth of the allegations contained in paragraph VIII of the complaint. Defendants admit, however, that said Federal Emergency Administration of Public Works made a grant of money, the exact amount of which is unknown to defendants, to said Board of Administrators of the Charity Hospital of Louisiana at New Orleans, for said project. Defendants further aver that the amount of said grant was only a minor portion of that required by said Charity Hospital to complete said construction project.

IX.

Defendants admit the truth of the allegations contained in paragraph IX of the complaint.

X.

Defendants deny the truth of the allegations contained in paragraph X of the complaint.

XI.

Defendants deny the truth of the allegations contained in paragraph XI of the complaint, except as may be admitted herein. Defendants aver that at a meeting of New Orleans Chapter, Associated General Contractors of America, Inc., held on January 6, 1937, a resolution was adopted reading as follows: "That in future Association fees are mandatory on all jobs, regardless of whether same are Federal, State or otherwise." Defendants further aver that all of the defendants, with the exception of said Boh and Lagarde, and said individual partners thereof, were members of said New Orleans Chapter, Associated General Contractors of America, Inc., on said date.

XII.

Defendants deny the truth of the allegations of paragraph XII of the complaint, except as may be admitted herein. Defendants admit that the parties named in said paragraph agreed that each of them would include in his or its bid on said project, the amount of estimating, quantity survey and chapter fees of all other bidders on said project, and that the successful bidder would pay such amount to New Orleans Chapter, Associated Gen-

eral Contractors of America, Inc., which was to retain therefrom the chapter fees due it, and out of the balance reimburse the other said contractors the amount of said estimating and quantity survey fees incurred by them in bidding on said project. Defendants aver that said practice was not only entirely lawful, but actually beneficial to said Charity Hospital of Louisiana at New Orleans, and had the effect of rendering the construction of said project cheaper than it would otherwise have been. That said practice was known to the Board of Administrators and the architects of said Charity Hospital, acting for it, prior to, and at the time of, submission of said bids, and was approved by them. That said practice was also known at said times to the officials of the Federal Government concerned in the supervision of said project in its behalf.

XIII.

Defendants deny the truth of the allegations contained in paragraph XIII of the complaint, except as may be admitted herein. Defendants admit that they were the only bidders on said project; that the amounts of their respective base bids are set forth correctly in said paragraph, except that said base bid of said Boh & Lagarde was $894,400; that each of said bids included a certain amount to cover the estimating, quantity survey and chapter fees of all of the other said bidders on said project; that defendant R. P. Farnsworth & Company, Inc., was the successful bidder and paid said amount to defendant, New Orleans Chapter, Associated General Contractors of America, Inc.; that out of said amount the latter retained said chapter fees due it, paid W. F. Jackson Company its charges for making a quantity survey of said project for said defendant contractors, and reimbursed said defendant contractors for the amount of the

estimating fees incurred by them in bidding on said project.

XIV.

Defendants deny the truth of the allegations contained in paragraph XIV of the complaint.

XV.

Defendants deny the truth of the allegations contained in paragraph XV of the complaint.

Counter-Claim.

I.

Samuel Ostrager, plaintiff herein and a resident of California, has wilfully and maliciously included in his said complaint, false and defamatory statements concerning defendants, falsely charging them, and each of them, with conspiring to defraud, injure, and cheat the United States and divert and assist in diverting its monies, and submitting false and fraudulent written claims for payment of money, and with committing other offenses, as set forth in said complaint.

II.

As a result of said false, malicious and libelous statements defendants W. Horace Williams Company, Inc., Doullut & Ewin, Inc., and R. P. Farnsworth & Company, Inc., have been injured in the sum of one hundred thousand ($100,000.00) dollars each; defendant, Arthur P. Boh, Henry Boh, John V. Burkes, Robert T. Burkes, Verne Caldwell, Summa Caldwell, Monte E. Hart, James P. Ewin, Olin J. Farnsworth, Lionel F. Favret, Theodore A.

Pittman, Houston C. Pittman, Everett Pittman, Herman T. Makofsky and W. Horace Williams have been injured in the sum of fifty thousand ($50,000.00) dollars each.

III.

Defendants demand trial by jury.

Wherefore, the premises considered, defendants pray that the complaint herein be dismissed at plaintiff's costs, and that judgment be entered herein in favor of defendants, W. Horace Williams Company, Inc., Doullut & Ewin, Inc., and R. P. Farnsworth & Company, Inc., and against plaintiff, Samuel Ostrager, in the sum of one hundred thousand ($100,000.00) dollars each; that judgment be rendered herein in favor of defendants, Arthur P. Boh, Henry Boh, John V. Burkes, Robert T. Burkes, Verne Caldwell, Summa Caldwell, Monte E. Hart, James P. Ewin, Olin J. Farnsworth, Lionel F. Favret, Theodore A. Pittman, Houston C. Pittman, Everett Pittman, Herman T. Makofsky and W. Horace Williams, and against plaintiff, Samuel Ostrager, in the sum of fifty thousand ($50,000.00) dollars each; and for such other and further relief as equity, law and the nature of the case may require.

EBERHARD P. DEUTSCH,
(Eberhard P. Deutsch)
of
DEUTSCH AND KERRIGAN,
Attorneys for Defendants.

17th Floor, Hibernia Bank Bldg.,
New Orleans.

MOTION TO DISMISS COUNTER-CLAIM OF DEFENDANTS, TO HAVE COUNTER-CLAIM STRICKEN, AND TO STRIKE FROM ANSWER CERTAIN ALLEGATIONS.

15 Filed August 20th, 1940.

(Title Omitted.)

Samuel Ostrager, plaintiff, by and through his attorneys, Alexander H. Schullman, and Orloff & Katz, and Katz & Amato, moves the Court as follows:

1. To dismiss the counter-claim of defendants in the above entitled action on the ground that it fails to state a claim against plaintiff for which relief can be granted.

2. To have said counter-claim of defendants stricken on the ground that it is improperly pleaded as part of the above entitled proceedings.

3. To have said counter-claim of defendants stricken on the ground that the alleged cause of action therein stated is improperly pleaded in advance of the termination of plaintiff's cause of action.

4. To strike from the answer of defendants each and every, all and singular, of the allegations contained in the second defense of said answer on the ground that said allegations in said second defense constitute conclusions of law, impertinences and immaterialities.

5. T strike so much of paragraph XII of the third defense of defendants' answer, that is, the words and figures, as follows:

"Defendants aver that said practice was not only entirely lawful, but actually beneficial to said Charity Hospital of Louisiana at New Orleans, and had the effect of rendering the construction of said project cheaper than it would other wise have been. That said practice was known to the Board of Administrators and the architects of said Charity Hospital, acting for it, prior to, and at the time of, submission of said bids, and was approved by them. That said practice was also known at said times to the officials of the Federal Government concerned in the supervision of said project in its behalf."

on the ground that the said allegations are impertinent, immaterial and conclusions of law.

Said motion will be made upon the records and files of the above entitled matter.

Dated: August 15, 1940.

ALEXANDER H. SCHULLMAN,
and
ORLOFF & KATZ, and
KATZ & AMATO,
By (Signature Illegible),
Attorneys for Plaintiff, Samuel Ostrager.

NOTICE OF MOTION TO DISMISS COUNTER-CLAIM OF DEFENDANTS, TO HAVE COUNTER-CLAIM STRICKEN, AND TO STRIKE FROM ANSWER CERTAIN ALLEGATIONS.

17 Filed August 20th, 1940.

(Title Omitted.)

To Defendants, New Orleans Chapter, Associated General Contractors of America, Inc., Doullut & Ewin, Inc.,

R. P. Farnsworth & Company, Inc., W. Horace Williams Company, Inc., Arthur P. Boh, Henry Boh, Burkes Bros., John V. Burkes, Robert T. Burkes, Caldwell Bros. & Hart, Summa Caldwell, Verne Caldwell, Monte E. Hart, James P. Ewin, Olin J. Farnsworth, Lionel F. Favret, Pittman Bros. Construction Company, Theodore A. Pittman, Houston C. Pittman, Everett Pittman, Herman T. Makofsky and W. Horace Williams, and their attorneys, Deutsch and Kerrigan:

Please Take Notice that the undersigned, appearing on behalf of Samuel Ostrager, plaintiff, will bring the motion, a copy of which is attached, on for hearing before the above entitled Court at Court Room ....., before the Honorable Adrian J. Caillouet, Judge thereof, on the 28th day of August, 1940, at the hour of 10 o'clock A. M., or as soon thereafter as counsel can be heard.

Dated: August 15, 1940.

ALEXANDER H. SCHULLMAN,
and
ORLOFF & KATZ, and
KATZ AMATO,
By (Signature illegible)
Attorneys for Plaintiff, Samuel Ostrager.

CASE CALLED, HEARING, ARGUMENT AND SUBMISSION.

18 (Number and Title Omitted.)

Extract from the Minutes.

May Term, 1940.

New Orleans, Monday, September 23, 1940.

Court met pursuant to adjournment;

Present: Hon. Wayne G. Borah, Judge,
Hon. A. J. Caillouet, Judge.

This matter came on for hearing this day on the first and second defenses contained in the answer filed by defendants New Orleans Chapter, Associated General Contractors of America, Inc., Doullut & Ewin, Inc., R. P. Farnsworth & Company, Inc., W. Horace Williams Company, Inc., Arthur P. Boh, Henry Boh, Burkes Bros., John B. Burkes, Robert T. Burkes, Caldwell Bros. & Hart, Summa Caldwell, Verne Caldwell, Monte E. Hart, James P. Ewin, Olin J. Farnsworth, Lionel F. Favret, Pittman Bros. Construction Company, Theodore A. Pittman, Houston C. Pittman, Everett Pittman, Herman T. Makofsky and W. Horace Williams; on the motion of said defendants for a separate trial of their counter-claim; on plaintiff's motion to strike said counter-claim, and on the first defense plead in the answer of defendant Arthur Lagarde.

Present:

Julius Katz, Esq.,
Attorney for Plaintiff.

E. P. Deutsch, Esq.,
Attorney for Defendants New Orleans Chapter, Associated General Contractors of America, Inc., Doullut & Ewin, Inc., R. P. Farnsworth & Company, Inc., W. Horace Williams Company, Inc., Arthur P. Boh, Henry Boh, Burkes Bros., John B. Burkes, Robert T. Burkes, Caldwell Bros. & Hart, Summa Caldwell, Verne Caldwell, Monte E. Hart, James P. Ewin, Olin J. Farnsworth, Lionel Favret, Pittman Bros. Construction Company, Theodore A. Pittman, Houston C. Pittman, Everett Pittman, Herman T. Makofsky and W. Horace Williams.

Robt. A. Pascal, Esq.,
Attorney for Arthur Lagarde.

Plaintiff having moved orally for a continuance herein, it is Ordered that same be, and it is, denied.

Whereupon, after hearing argument of counsel for the respective parties and evidence on behalf of defendants, the matter was submitted, when the Court took time to consider, plaintiff being granted two weeks within which to file briefs and defendants being granted three days thereafter in which to reply.

19 NOTE OF EVIDENCE.

Filed September 23rd, 1940.

(Title Omitted.)

Counsel for defendants, New Orleans Chapter, Associated General Contractors of America, Inc., Doullut & Ewin, Inc., R. P. Farnsworth & Company, Inc., W. Horace Williams Company, Inc., Arthur P. Boh, Henry Boh, Burkes Bros., John B. Burkes, Robert T. Burkes, Caldwell Bros. & Hart, Summa Caldwell, Verne Caldwell, Monte E. Hart, James P. Ewin, Olin J. Farnsworth, Lionel F. Favret, Pittman Bros. Construction Company, Theodore A. Pittman, Houston C. Pittman, Everett Pittman, Herman T. Makofsky and W. Horace Williams, now offer, introduce and ask leave to file in evidence, the entire record in the case of "United States of America vs. New Orleans Chapter, Associated General Contractors of America, Inc., et al", bearing the No. 19,843 of the criminal docket of this Court.

EBERHARD P. DEUTSCH,
(Eberhard P. Deutsch)
of
DEUTSCH & KERRIGAN,
Counsel for Defendants.

17th Floor, Hibernia Bank Bldg.,
New Orleans.

New Orleans, September 23, 1940.

20 CRIMINAL RECORD OFFERED IN EVIDENCE ON SEPTEMBER 23rd, 1940.

FINDING OF TRUE BILL.

Extract from the Minutes.

November Term, 1939.

New Orleans, Saturday, December 2, 1939.

Court met pursuant to adjournment:

Present: Hon. Rufus E. Foster, Circuit Judge.

The Grand Jury for the Eastern District of Louisiana, having been adjourned to this date, the following members thereof appeared and answered to their names, to-wit:

1, Chas. R. Matthews, Foreman; 2, Walter Jensen; 3, F. M. Leguenec, Jr.; 4, M. J. Keating; 5, Patrick Morrissey; 6, M. C. Touzet; 7, Geo. M. Carnes; 8, Irvin C. Briel; 9, Louis Sere; 10, Frank S. Walshe; 11, Aug. W. Nolde; 12, B. H. Talbot, Jr.; 13, A. J. Winter; 14, J. W. Reily; 15, J. A. Cragwall; 16, Moise S. Cahn; 17, James G. Aldige; 18, R. H. Colcock, III; 19, Joseph M. Livaudais; 20, Roger Arnauld; 21, John J. Saucier; 22, Samuel M. Angell; 23, Lawrence J. Wetta.

Thereupon, the Grand Jury retired to its chambers for deliberation upon such matters as might be laid before it for investigation, and thereafter returned into open Court, and then and there, in open Court, through its foreman, returned the following Indictments, which findings were ordered to be recorded, to-wit:

INDICTMENT.

(Number and Title Omitted.)

Violation: Title 18, Sec. 88, U. S. C., Sec. 9 of Emergency Appropriation Relief Act of 1935.

A True Bill:

New Orleans, La., December 2, 1939.

CHAS. R. MATTHEWS,
Foreman.

Whereupon, it was Ordered that the Grand Jury stand adjourned subject to call.

21

INDICTMENT.

Filed December 2nd, 1939.

United States of America,
Eastern District of Louisiana,
New Orleans Division.

In the District Court of the United States, in and for the Eastern District of Louisiana, New Orleans Division, at the November term thereof, A. D. 1939.

The Grand Jurors of the United States duly impaneled, sworn and charged at New Orleans, at the term aforesaid, of the Court aforesaid, on their oaths present and charge:

I.

That heretofore, to-wit, beginning on or about the 6th day of January, 1937, the exact date being to your Grand

Jurors unknown, and continuing up to and including the date of this indictment, in the New Orleans Division of the Eastern District of Louisiana, and within the jurisdiction of this Court, the following:

New Orleans Chapter, Associated General Contractors of America, Inc., a Louisiana corporation, with its principal place of business in New Orleans, Louisiana;

R. P. Farnsworth & Co., Inc., a Delaware corporation, with its principal place of business in New Orleans, Louisiana;

W. Horace Williams Co., Inc., a Louisiana corporation, with its principal place of business in New Orleans, Louisiana;

Doullut & Ewin, Inc., a Louisiana corporation, with its principal place of business in New Orleans, Louisiana;

Herman T. Makofsky;
Lionel F. Favret;
Henry Boh;
Arthur P. Boh;
Arthur Lagarde (Dismissed);
Summa Caldwell;
Monte E. Hart;
Theodore A. Pittman;
Olin J. Farnsworth;
W. Horace Williams;
James P. Ewin;
John V. Burkes; and
Robert T. Burkes,

whose names are to your Grand Jurors otherwise unknown, the defendants herein, and divers other persons

to your Grand Jurors unknown, did unlawfully, wilfully, knowingly and feloniously combine, conspire, confederate and agree together and with each other to defraud the United States and to commit certain offenses against the United States, to-wit, to violate Section 9 of the Emergency Relief Appropriation Act of 1935;

That it was the purpose, object and intent of this conspiracy to defraud the United States by diverting for the use and benefit of the defendants herein, persons not entitled thereto, funds which had been theretofore appropriated by the Congress of the United States through the passage of the Emergency Relief Appropriation Act of 1935, Supplemental Appropriation Act, fiscal year 1936 and the First Deficiency Appropriation Act of 1936, and which funds had been granted by the United States to the State of Louisiana under the provisions of the said Emergency Relief Appropriation Act of 1935, Supplemental Appropriation Act, fiscal year 1936 and the First Deficiency Appropriation Act of 1936 for use in building the Charity Hospital at New Orleans, Louisiana.

II.

That it was a part of the said conspiracy that each of the defendants submitting bids, who were the only bidders on the contract for the foundation work for the Main Building of the said Charity Hospital, would arbitrarily add to the amount of his bid on said contract a sum in excess of Seven Thousand Five Hundred Dollars ($7,500.00) which sum represented the estimating, quantity survey and chapter fees of all of the bidders on said contract;

That it was a further part of the said conspiracy that the successful bidder on said contract would pay to the

defendant New Orleans Chapter, Associated General Contractors of America, Inc., the monies received by him from the United States of America out of the appropriations aforesaid, and from the State of Louisiana, on said contract, the sum in excess of Seven Thousand Five Hundred Dollars ($7,500.00), which had been so added to the amount of his bid and said defendant New Orleans Chapter, Associated General Contractors of America, Inc., would distribute the same among the various unsuccessful bidders on the said contract, the W. F. Jackson Company, and to the defendant New Orleans Chapter, Associated General Contractors of America, Inc.

III.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further allege, charge, find and present: That in pursuance of said conspiracy and to effect the purposes and objects thereof, the following overt acts were committed by the defendants, to-wit:

1. That on or about the 6th day of January, 1937, at New Orleans, Louisiana, and within the jurisdiction of this Court, a resolution was adopted at a regular meeting of the members of the defendant New Orleans Chapter, Associated General Contractors of America, Inc., requiring each member of said defendant to add to the amount of each bid thereafter offered and submitted by him, the association fees then in force, regardless of whether such bids were on Federal or State jobs, or otherwise.

2. That on or about April 12th, 1937, at New Orleans, Louisiana, and within the jurisdiction of this Court, the defendants agreed that Herman T. Makofsky, W. Horace Williams Co., Inc., Doullut & Ewin, Inc., Lionel F. Favret,

R. P. Farnsworth & Co., Inc., Caldwell Bros. & Hart, a partnership of Summa and Verne Caldwell and Monte E. Hart, Boh & Lagarde, a partnership of Henry and Arthur P. Boh and Arthur Lagarde, Burkes Bros., a partnership of Robert T. and John V. Burkes, and Pittman Bros. Construction Co., a partnership of Theodore A., Houston C. and Everett Pittman would add to their bids on the foundation of the Main Building of the Charity Hospital the fees above described, aggregating in excess of Seven Thousand Five Hundred Dollars ($7,500.00).

3. That on or about April 14th, 1937, at New Orleans, Louisiana, and within the jurisdiction of this Court the defendant R. P. Farnsworth & Co., Inc., offered and submitted and caused to be offered and submitted a bid to the Board of Administrators of the Charity Hospital of Louisiana, at New Orleans, in the sum of Seven Hundred Fifteen Thousand Three Hundred Eighty Dollars ($715,380.00) for the construction of the foundation for the Main Building of said Charity Hospital.

4. That on or about April 14th, 1937, at New Orleans, Louisiana, and within the jurisdiction of this Court the defendant Doullut & Ewin, Inc., offered and submitted and caused to be offered and submitted a bid to the Board of Administrators of the Charity Hospital of Louisiana, at New Orleans, in the sum of Eight Hundred Eighty-five Thousand Dollars ($885,000.00) for the construction of the foundation for the Main Building of said Charity Hospital.

5. That on or about April 14th, 1937, at New Orleans, Louisiana, and within the jurisdiction of this Court, the defendant W. Horace Williams Co., Inc., and said partnership Caldwell Bros. & Hart offered and submitted a bid to the Administrators of the Charity Hospital of

Louisiana, at New Orleans, in the sum of Seven Hundred and Seventy-three Thousand One Hundred and Thirteen ($773,113.00) Dollars for the construction of the foundation for the Main Building of said Charity Hospital.

6. That on or about April 14, 1937, at New Orleans, Louisiana, and within the jurisdiction of this Court, Boh & Lagarde, the partnership aforesaid, offered and submitteed and caused to be offered and submitted a bid to the Board of Administrators of the Charity Hospital of Louisiana, at New Orleans, in the sum of Eight Hundred Ninety-four Thousand Four Hundred Dollars ($894,400.00) for the construction of the foundation for the Main Building of said Charity Hospital.

7. That on or about April 14, 1937, at New Orleans, Louisiana, and within the jurisdiction of this Court, Pittman Bros. Construction Co., the partnership aforesaid, offered and submitted and caused to be offered and submitted a bid to the Board of Administrators of said Charity Hospital of Louisiana, at New Orleans, in the sum of Nine Hundred Fifty-nine Thousand Seven Hundred Forty Dollars ($959,740.00) for the construction of the foundation for the Main Building of said Charity Hospital.

8. That on or about April 14, 1937, at New Orleans, Louisiana, and within the jurisdiction of this Court, Burkes Bros., the partnership aforesaid, offered and submitted and caused to be offered and submitted a bid to the Board of Administrators of the Charity Hospital of Louisiana, at New Orleans, in the sum of Nine Hundred Four Thousand Nine Hundred Dollars ($904,900.00) for the construction of the foundation for the Main Building of said Charity Hospital.

9. That on or about April 14, 1937, at New Orleans, Louisiana, and within the jurisdiction of this Court, the defendant Herman T. Makofsky offered and submitted and caused to be offered and submitted a bid to the Board of Administrators of the Charity Hospital of Louisiana, at New Orleans, in the sum of Nine Hundred Five Thousand Three Hundred Fifty Dollars ($905,350.00) for the construction of the foundation for the Main Building of said Charity Hospital.

10. That on or about April 14, 1937, at New Orleans, Louisiana, and within the jurisdiction of this Court, the defendant Lionel F. Favret offered and submitted and caused to be offered and submitted a bid to the Board of Administrators of the Charity Hospital of Louisiana, at New Orleans, in the sum of Nine Hundred Eight Thousand Dollars ($908,000.00) for the construction of the foundation for the Main Building of said Charity Hospital.

11. That on or about the 20th day of August, 1937, at New Orleans, Louisiana, and within the jurisdiction of this Court, the defendant R. P. Farnsworth & Co., Inc., paid to the New Orleans Chapter, Associated General Contractors of America, Inc., Eight Thousand Two Hundred Ninety-two Dollars ($8,292.00), of which amount Seven Thousand Six Hundred Twenty Dollars ($7,620.00) had been added to the amount of its said bid on the foundation for the Main Building of Charity Hospital, and paid to it in part from funds of the United States of America out of appropriations aforesaid.

12. That on or about the 20th day of August, 1937, at New Orleans, Louisiana, and within the jurisdiction of this Court, the defendant New Orleans Chapter, Associated General Contractors of America, Inc., paid to Cald-

well Bros. & Hart and W. Horace Williams Co., Inc., the sum of Eight Hundred Forty Dollars ($840.00).

13. That on or about the 20th day of August, 1937, at New Orleans, Louisiana, and within the jurisdiction of this Court, the defendant New Orleans Chapter, Associated General Contractors of America, Inc., paid to Doullut and Ewin, Inc., the sum of Eight Hundred Forty Dollars ($840.00).

14. That on or about the 20th day of August, 1937, at New Orleans, Louisiana, and within the jurisdiction of this Court, the defendant New Orleans Chapter, Associated General Contractors of America, Inc., paid to Boh & Lagarde the sum of Eight Hundred Forty Dollars ($840.00).

15. That on or about the 20th day of August, 1937, at New Orleans, Louisiana, and within the jurisdiction of this Court, the defendant New Orleans Chapter, Associated General Contractors of America, Inc., paid to Burkes Bros. the sum of Eight Hundred Forty Dollars ($840.00).

16. That on or about the 20th day of August, 1937, at New Orleans, Louisiana, and within the jurisdiction of this Court, the defendant New Orleans Chapter, Associated General Contractors of America, Inc., paid to Herman T. Makofsky the sum of Eight Hundred Forty Dollars ($840.00).

17. That on or about the 20th day of August, 1937, at New Orleans, Louisiana, and within the jurisdiction of this Court, the defendant New Orleans Chapter, Associated General Contractors of America, Inc., paid to Lionel F. Favret, the sum of Eight Hundred Forty Dollars ($840.00).

18. That on or about the 20th day of August, 1937, at New Orleans, Louisiana, and within the jurisdiction of this Court, the defendant New Orleans Chapter, Associated General Contractors of America, Inc., paid to Pittman Bros. Construction Company the sum of Eight Hundred Forty Dollars ($840.00).

19. That on or about the 20th day of August, 1937, at New Orleans, Louisiana, and within the jurisdiction of this Court, the defendant New Orleans Chapter, Associated General Contractors of America, Inc., paid to W. F. Jackson Company the sum of Eight Hundred Forty Dollars ($840.00).

IV.

And so the Grand Jurors aforesaid, upon their oaths aforesaid do present and charge that the said defendants, together with divers other persons whose names are to the Grand Jurors unknown and therefore not herein mentioned throughout the period of time and at the places and in the manner and form aforesaid unlawfully, wilfully, knowingly and feloniously did conspire, combine, confederate and agree together and with each other to defraud the United States and to commit an offense against the United States and did do acts to effect the object of said conspiracy in violation of Section 88 of Title 18 United States Code, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

Count Two.

And the Grand Jurors aforesaid on their oaths aforesaid do further present and charge that:

New Orleans Chapter, Associated General Contractors of America, Inc., a Louisiana corporation, with its principal place of business in New Orleans, Louisiana;

R. P. Farnsworth & Co., Inc., a Delaware corporation, with its principal place of business in New Orleans, Louisiana;

W. Horace Williams Co., Inc., a Louisiana corporation, with its principal place of business in New Orleans, Louisiana;

Doullut & Ewin, Inc., a Louisiana corporation, with its principal place of business in New Orleans, Louisiana;

Herman T. Makofsky;
Lionel F. Favret;
Henry Boh;
Arthur P. Boh;
Arthur Lagarde;
Summa Caldwell;
Monte E. Hart;
Theodore A. Pittman;
Olin J. Farnsworth;
W. Horace Williams;
James P. Ewin;
John V. Burkes; and
Robert T. Burkes,

the defendants herein, throughout the period beginning on or about the 14th day of April, 1937, and continuing until on or about the 20th day of August, 1937, at New Orleans, in the Parish of Orleans, in the New Orleans Division of the Eastern District of Louisiana and within the jurisdiction of this Court, did knowingly, wilfully and unlawfully and with intent to defraud the United States,

divert, attempt to divert, and assist in diverting for the benefit of the said defendants and W. F. Jackson Company certain monies the exact amount of which is to the Grand Jurors unknown and therefore not herein set forth, allocated out of an appropriation under the authority of the Emergency Relief Appropriation Act of 1935, Supplemental Appropriation Act, fiscal year 1936, and the First Deficiency Appropriation Act of 1936, for the purpose of constructing certain buildings in the City of New Orleans, Louisiana, for the Board of Administrators of the Charity Hospital of Louisiana, at New Orleans, to-wit: the foundation for the Main Building of the said Charity Hospital, said project being known as Docket No. 4529 R and 4529 D, the cost of which project was financed in part out of appropriations aforesaid by the Federal Emergency Administration of Public Works, an agency of the United States of America, the said defendants and W. F. Jackson Company being then and there persons not entitled to any benefit under the provisions of the said Emergency Relief Appropriation Act of 1935, Supplemental Appropriation Act, fiscal year 1936, and the First Deficiency Appropriation Act of 1936, that is to say, that they the said defendant general contractors, being the only bidders on the project aforesaid, did wilfully and unlawfully add to their individual bids, which were to be submitted in connection with the project aforesaid, prior to their submission, certain agreed amounts which were each composed of sums, portions of which were to be collected and were collected by the successful bidder out of the appropriations aforesaid and were to be paid and were paid by the successful bidder to the New Orleans Chapter, Associated General Contractors of America, Inc., and by said Chapter distributed to the said defendants and W. F. Jackson Company all for the purpose and with the intent of obtaining funds from the said allocation and appropriation of monies aforesaid, for

the use and benefit of the said defendants and W. F. Jackson Company, persons not entitled thereto and in violation of Section 9 of the Emergency Relief Appropriation Act of 1935 (Public Resolution No. 11, 74th Congress); contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

RENE A. VIOSCA,
United States Attorney.
J. SKELLY WRIGHT,
Assistant United States Attorney.
TOM C. CLARK,
Special Assistant to the Attorney General.
THOMAS J. MURPHY,
Special Assistant to the Attorney General.

A True Bill.

New Orleans, La., Dec. 2, 1939.

CHAS. R. MATTHEWS,
Foreman.

32 CAPIAS FOR NEW ORLEANS CHAPTER, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.

Bond for $1000.00.

District Court of the United States of America,
Eastern District of Louisiana.

The President of the United States of America.

To the Marshal of the United States for the Eastern District of Louisiana—Greeting:

You Are Hereby Commanded to arrest forthwith the body of New Orleans Chapter, Associated General Contractors of America, Inc., and him have before our District Court of the United States for the Eastern District of Louisiana, at the City of New Orleans, to answer to an indictment therein found and now pending against him for violation of the Emergency Relief Appropriation Act of 1935 (Sec. 9), etc., and to be otherwise dealt with according to law.

Witness, the Honorable Wayne G. Borah, Judge of the District Court of the United States for the Eastern District of Louisiana, this 2nd day of December, A. D. 1939.

A. DALLAM O'BRIEN, JR.,
Clerk,
By N. H. LEWIS,
Deputy Clerk.

33 CAPIAS FOR R. P. FARNSWORTH & CO., INC.

Bond of $1,000.00 Bond.

District Court of the United States of America,
Eastern District of Louisiana.

The President of the United States of America.

To the Marshal of the United States for the Eastern District of Louisiana—Greeting:

You Are Hereby Commanded to arrest forthwith the body of R. P. Farnsworth & Co., Inc., and him have before our District Court of the United States for the Eastern District of Louisiana, at the City of New Orleans, to answer to an indictment therein found and now pending against him for violation of the Emergency Relief Appropriation Act of 1935 (Section. 9, etc.), and to be otherwise dealt with according to law.

Witness; the Honorable Wayne G. Borah, Judge of the District Court of the United States for the Eastern District of Louisiana, this 2nd day of December, A. D. 1939.

A. DALLAM O'BRIEN, JR.,
Clerk,
By N. H. LEWIS,
Deputy Clerk.

34 CAPIAS FOR W. HORACE WILLIAMS CO., INC.

Bond of $1,000.00.

District Court of the United States of America,
Eastern District of Louisiana.

The President of the United States of America.

To the Marshal of the United States for the Eastern District of Louisiana—Greeting:

You Are Hereby Commanded to arrest forthwith the body of W. Horace Williams Co., Inc., and him have before our District Court of the United States for the Eastern District of Louisiana, at the City of New Orleans, to answer to an indictment therein found and now pending against him for violation of the Emergency Relief Appropriation Act of 1935 (Sec. 9, etc.), and to be otherwise dealt with according to law.

Witness, the Honorable Wayne G. Borah, Judge of the District Court of the United States for the Eastern District of Louisiana, this 2nd day of December, A. D. 1939.

A. DALLAM O'BRIEN, JR.,
Clerk,
By N. H. LEWIS,
Deputy Clerk.

35 CAPIAS FOR DOULLUT & EWIN, INC.

$1,000.00 Bond.

District Court of the United States of America,
Eastern District of Louisiana.

The President of the United States of America.

To the Marshal of the United States for the Eastern District of Louisiana—Greeting:

You Are Hereby Commanded to arrest forthwith the body of Doullut & Ewin, Inc., and him have before our District Court of the United States for the Eastern District of Louisiana, at the City of New Orleans, to answer to an indictment therein found and now pending against him and to be otherwise dealt with according to law.

Witness, the Honorable Wayne G. Borah, Judge of the District Court of the United States for the Eastern District of Louisiana, this 2nd day of December, A. D. 1939.

A. DALLAM O'BRIEN, JR.,
Clerk,
By N. H. LEWIS,
Deputy Clerk.

36 CAPIAS FOR HERMAN T. MAKOFSKY.

District Court of the United States of America,
Eastern District of Louisiana.

The President of the United States of America.

To the Marshal of the United States for the Eastern District of Louisiana—Greeting:

You Are Hereby Commanded to arrest forthwith the body of Herman T. Makofsky and him have before our District Court of the United States for the Eastern District of Louisiana, at the City of New Orleans, to answer

to an indictment therein found and now pending against him for violation of the Emergency Relief Appropriation Act of 1935 (Sec. 9), etc., and to be otherwise dealt with according to law.

Witness, the Honorable Wayne G. Borah, Judge of the District Court of the United States for the Eastern District of Louisiana, this 2nd day of December, A. D. 1939.

A. DALLAM O'BRIEN, JR.,
Clerk,
By N. H. LEWIS,
Deputy Clerk.

37 MARSHAL'S RETURN ON CAPIAS FOR HERMAN T. MAKOFSKY.

No. 19843.

Capias.

Received this Capias on the 4 day of Dec., 1939, and on the 4 day of Dec., 1939, I executed the same by arresting the within named Herman T. Makofsky at P. O. Bldg. in the City of New Orleans, La., and have his body now in Court, as within commanded.

H. C. RICHARDSON,
United States Marshal,
By JOSEPH T. SHEA,
Deputy.

Filed Dec. 5, 1939.

38 CAPIAS FOR LIONEL F. FAVRET.

$1,000.00 Bond.

District Court of the United States of America,
Eastern District of Louisiana.

The President of the United States of America.

To the Marshal of the United States for the Eastern District of Louisiana—Greeting:

You Are Hereby Commanded to arrest forthwith the body of Lionel F. Favret and him have before our District Court of the United States for the Eastern District of Louisiana, at the City of New Orleans, to answer to an indictment therein found and now pending against him for violation of the Emergency Relief Appropriation Act of 1935 (Sec. 9), etc., and to be otherwise dealt with according to law.

Witness, the Honorable Wayne G. Borah, Judge of the District Court of the United States for the Eastern District of Louisiana, this 2nd day of December, A. D. 1939.

A. DALLAM O'BRIEN, JR.,
Clerk,
By N. H. LEWIS,
Deputy Clerk.

39 MARSHAL'S RETURN ON CAPIAS FOR LIONEL F. FAVRET.

No. 19843.

Capias.

Received this Capias on the 4 day of Dec., 1939, and on the 4 day of Dec., 1939, I executed the same by arresting the within named Lionel F. Favret at P. O. Bldg.

in the City of New Orleans, La., and have his body now in Court, as within commanded.

H. C. RICHARDSON,
United States Marshal,
By JOSEPH T. SHEA,
Deputy.

Filed Dec. 5, 1939.

40 CAPIAS FOR HENRY BOH.

Bond of $1,000.00.

District Court of the United States of America,
Eastern District of Louisiana.

The President of the United States of America.

To the Marshal of the United States for the Eastern District of Louisiana—Greeting:

You Are Hereby Commanded to arrest forthwith the body of Henry Boh and him have before our District Court of the United States for the Eastern District of Louisiana, at the City of New Orleans, to answer to an indictment therein found and now pending against him for violation of the Emergency Relief Appropriation Act of 1935 (Sec. 9, etc.), and to be otherwise dealt with according to law.

Witness, the Honorable Wayne G. Borah, Judge of the District Court of the United States for the Eastern District of Louisiana, this 2nd day of December, A. D. 1939.

A. DALLAM O'BRIEN, JR.,
Clerk,
By N. H. LEWIS,
Deputy Clerk.

41 MARSHAL'S RETURN ON CAPIAS FOR HENRY BOH.

No. 19843.

Capias.

Received this Capias on the 4 day of Dec., 1939, and on the 4 day of Dec., 1939, I executed the same by arresting the within named Henry Boh at P. O. Bldg. in the City of New Orleans, La., and have his body now in Court, as within commanded.

H. C. RICHARDSON,
United States Marshal,
By JOSEPH T. SHEA,
Deputy.

Filed Dec. 5, 1939.

42 CAPIAS FOR ARTHUR P. BOH.

Bond of $1,000.00.

District Court of the United States of America,
Eastern District of Louisiana.

The President of the United States of America.

To the Marshal of the United States for the Eastern District of Louisiana—Greeting:

You Are Hereby Commanded to arrest forthwith the body of Arthur P. Boh and him have before our District Court of the United States for the Eastern District of

Louisiana, at the City of New Orleans, to answer to an indictment therein found and now pending against him for violation of the Emergency Relief Appropriation Act of 1935 (Sec. 9, etc.) and to be otherwise dealt with according to law.

Witness, the Honorable Wayne G. Borah, Judge of the District Court of the United States for the Eastern District of Louisiana, this 2nd day of December, A. D. 1939.

A. DALLAM O'BRIEN, JR.,
Clerk,
By N. H. LEWIS,
Deputy Clerk.

43 MARSHAL'S RETURN ON CAPIAS FOR ARTHUR P. BOH.

No. 19843.

Capias.

Received this Capias on the 4 day of Dec., 1939, and on the 4 day of Dec., 1939, I executed the same by arresting the within named Arthur P. Boh at P. O. Bldg. in the City of New Orleans, La., and have his body now in Court, as within commanded.

H. C. RICHARDSON,
United States Marshal,
By JOSEPH T. SHEA,
Deputy.

Filed Dec. 5, 1939.

44 CAPIAS FOR ARTHUR LAGARDE.

$1,000.00 Bond.

District Court of the United States of America,
Eastern District of Louisiana.

The President of the United States of America.

To the Marshal of the United States for the Eastern District of Louisiana—Greeting:

You Are Hereby Commanded to arrest forthwith the body of Arthur Lagarde and him have before our District Court of the United States for the Eastern District of Louisiana, at the City of New Orleans, to answer to an indictment therein found and now pending against him for violation of the Emergency Relief Appropriation Act of 1935 (Sec. 9), etc., and to be otherwise dealt with according to law.

Witness, the Honorable Wayne G. Borah, Judge of the District Court of the United States for the Eastern District of Louisiana, this 2nd day of December, A. D. 1939.

A. DALLAM O'BRIEN, JR.,
Clerk,
By N. H. LEWIS,
Deputy Clerk.

45 MARSHAL'S RETURN ON CAPIAS FOR ARTHUR LAGARDE.

No. 19843.

Capias.

Received this Capias on the 4 day of Dec., 1939, and on the 4 day of Dec., 1939. I executed the same by ar-

resting the within named Arthur Lagarde at P. O. Bldg. in the City of New Orleans, La., and have his body now in Court, as within commanded.

H. C. RICHARDSON,
United States Marshal,
By JOSEPH T. SHEA,
Deputy.

Bond of $1,000.00.

46 CAPIAS FOR SUMMA CALDWELL.

Bond for $1,000.00.

District Court of the United States of America.
Eastern District of Louisiana.

The President of the United States of America.

To the Marshal of the United States for the Eastern District of Louisiana—Greeting:

You Are Hereby Commanded to arrest forthwith the body of Summa Caldwell and him have before our District Court of the United States for the Eastern District of Louisiana, at the City of New Orleans, to answer to an indictment therein found and now pending against him for violation of Emergency Relief Appropriation Act of 1935 (Sec. 9), etc., and to be otherwise dealt with according to law.

Witness, the Honorable Wayne G. Borah, Judge of the District Court of the United States for the Eastern District of Louisiana, this 2nd day of December, A. D. 1939.

A. DALLAM O'BRIEN, JR.,
Clerk,
By N. H. LEWIS,
Deputy Clerk.

47 MARSHAL'S RETURN ON CAPIAS FOR SUMMA CALDWELL.

No. 19843.

Capias.

Received this Capias on the 4 day of Dec., 1939, and on the 4 day of Dec., 1939, I executed the same by arresting the within named Summa Caldwell at P. O. Bldg. in the City of New Orleans, La., and have hi body now in Court, as within commanded.

H. C. RICHARDSON,
United States Marshal,
By JOSEPH T. SHEA,
Deputy.

Filed Dec. 5, 1939.

48 CAPIAS FOR MONTE E. HART.

Bond of $1,000.00.

District Court of the United States of America,
Eastern District of Louisiana.

The President of the United States of America.

To the Marshal of the United States for the Eastern District of Louisiana—Greeting:

You Are Hereby Commanded to arrest forthwith the body of Monte E. Hart and him have before our District Court of the United States for the Eastern District of

Louisiana, at the City of New Orleans, to answer to an indictment therein found and now pending against him for violation of Emergency Relief Appropriation Act of 1935 (Sec. 9), etc., and to be otherwise dealt with according to law.

Witness, the Honorable Wayne G. Borah, Judge of the District Court of the United States for the Eastern District of Louisiana, this 2nd day of December, A. D. 1939.

A. DALLAM O'BRIEN, JR.,
Clerk,
By N. H. LEWIS,
Deputy Clerk.

49 MARSHAL'S RETURN ON CAPIAS FOR MONTE E. HART.

No. 19843.

Capias.

Received at New Orleans, Louisiana, on the 2nd day of December, 1939, and on the 4th day of December, 1939, I return same unexecuted for the reason that the within named Monte E. Hart appeared voluntarily before the United States Commissioner and made bond before same could be executed.

H. C. RICHARDSON,
United States Marshal,
By JOSEPH T. SHEA,
Deputy.

50 CAPIAS FOR THEODORE A. PITTMAN.

Bond of $1,000.00.

District Court of the United States of America,
Eastern District of Louisiana.

The President of the United States of America.

To the Marshal of the United States for the Eastern District of Louisiana—Greeting:

You Are Hereby Commanded to arrest forthwith the body of Theodore A. Pittman and him have before our District Court of the United States for the Eastern District of Louisiana, at the City of New Orleans, to answer to an indictment therein found and now pending against him for violation of Emergency Relief Appropriation Act of 1935 (Sec. 9), etc., and to be otherwise dealt with according to law.

Witness, the Honorable Wayne G. Borah, Judge of the District Court of the United States for the Eastern District of Louisiana, this 2nd day of December, A. D. 1939.

A. DALLAM O'BRIEN, JR.,
Clerk,
By N. H. LEWIS,
Deputy Clerk.

51 MARSHAL'S RETURN ON CAPIAS FOR THEODORE A. PITTMAN.

No. 19843.

Capias.

Received this Capias on the 4 day of Dec., 1939, and on the 4 day of Dec., 1939, I executed the same by arresting the within named Theodore A. Pittman at P. O. Bldg. in the City of New Orleans, La., and have his body now in Court, as within commanded.

H. C. RICHARDSON,
United States Marshal,
By JOSEPH T. SHEA,
Deputy.

Filed Dec. 5, 1939.

52 CAPIAS FOR OLIN J. FARNSWORTH.

Bond of $1,000.00.

District Court of the United States of America,
Eastern District of Louisiana.

The President of the United States of America.

To the Marshal of the United States for the Eastern District of Louisiana—Greeting:

You Are Hereby Commanded to arrest forthwith the body of Olin J. Farnsworth and him have before our District Court of the United States for the Eastern Dis-

trict of Louisiana, at the City of New Orleans, to answer to an indictment therein found and now pending against him for violation of Emergency Relief Appropriation Act of 1935 (Sec. 9), etc., and to be otherwise dealt with according to law.

Witness, the Honorable Wayne G. Borah, Judge of the District Court of the United States for the Eastern District of Louisiana, this 2nd day of December, A. D. 1939.

A. DALLAM O'BRIEN, JR.,
Clerk,
By N. H. LEWIS,
Deputy Clerk.

53 MARSHAL'S RETURN ON CAPIAS FOR OLIN J. FARNSWORTH.

No. 19843.

Capias.

Received this Capias on the 4 day of Dec., 1939, and on the 4 day of Dec., 1939, I executed the same by arresting the within named Olin J. Farnsworth at P. O. Bldg, in the City of New Orleans, La., and have his body now in Court, as within commanded.

H. C. RICHARDSON,
United States Marshal,
By JOSEPH T. SHEA,
Deputy.

Filed Dec. 5, 1939.

54 CAPIAS FOR W. HORACE WILLIAMS.

$1,000.00 Bond.

District Court of the United States of America,
Eastern District of Louisiana.

The President of the United States of America.

To the Marshal of the United States for the Eastern District of Louisiana—Greeting:

You Are Hereby Commanded to arrest forthwith the body of W. Horace Williams and him have before our District Court of the United States for the Eastern District of Louisiana, at the City of New Orleans, to answer to an indictment therein found and now pending against him for violation of Emergency Relief Appropriation Act of 1935 (Sec. 9), etc., and to be otherwise dealt with according to law.

Witness, the Honorable Wayne G. Borah, Judge of the District Court of the United States for the Eastern District of Louisiana, this 2nd day of December, A. D. 1939.

A. DALLAM O'BRIEN, JR.,
Clerk,
By N. H. LEWIS,
Deputy Clerk.

55 MARSHAL'S RETURN ON CAPIAS FOR W. HORACE WILLIAMS.

No. 19843.

Capias.

Received at New Orleans, Louisiana, on the 2nd day of December, 1939, and on the 8th day of December, 1939, I return same unexecuted for the reason that the within

named W. Horace Williams appeared voluntarily before the United States Commissioner and made bond before same could be executed.

H. C. RICHARDSON,
U. S. Marshal,
By P. A. GANDE,
Deputy.

56 CAPIAS FOR JAMES P. EWIN.

$1,000.00 Bond.

District Court of the United States of America,
Eastern District of Louisiana.

The President of the United States of America.

To the Marshal of the United States for the Eastern District of Louisiana—Greeting:

You Are Hereby Commanded to arrest forthwith the body of James P. Ewin and him have before our District Court of the United States for the Eastern District of Louisiana, at the City of New Orleans, to answer to an indictment therein found and now pending against him for violation of Emergency Relief Appropriation Act of 1935 (Sec. 9), etc., and be otherwise dealt with according to law.

Witness, the Honorable Wayne G. Borah, Judge of the District Court of the United States for the Eastern District of Louisiana, this 2nd day of December, A. D. 1939.

A. DALLAM O'BRIEN, JR.,
Clerk,
By N. H. LEWIS,
Deputy Clerk.

57 MARSHAL'S RETURN ON CAPIAS FOR JAMES P. EWIN.

No. 19843.

Capias.

Received this Capias on the 4 day of Dec., 1939, and on the 4 day of Dec., 1939, I executed the same by arresting the within named James P. Ewin at P. O. Bldg. in the City of New Orleans, La., and have his body now in Court, as within commanded.

H. C. RICHARDSON,
United States Marshal,
By JOSEPH T. SHEA,
Deputy.

Filed Dec. 5, 1939.

58 CAPIAS FOR JOHN V. BURKES.

$1,000.00 Bond.

District Court of the United States of America,
Eastern District of Louisiana.

The President of the United States of America.

To the Marshal of the United States for the Eastern District of Louisiana—Greeting:

You Are Hereby Commanded to arrest forthwith the body of John V. Burkes and him have before our District Court of the United States for the Eastern District of Louisiana, at the City of New Orleans, to answer to an

indictment therein found and now pending against him for violation of Emergency Relief Appropriation Act of 1935 (Sec. 9th), etc., and to be otherwise dealt with accord to law.

Witness, the Honorable Wayne G. Borah, Judge of the District Court of the United States for the Eastern District of Louisiana, this 2nd day of December, A. D. 1939.

A. DALLAM O'BRIEN, JR.,
Clerk,
By N. H. LEWIS,
Deputy Clerk.

59 MARSHAL'S RETURN ON CAPIAS FOR JOHN V. BURKES.

No. 19843.

Capias.

Received this Capias on the 4 day of Dec., 1939, and on the 4 day of Dec., 1939, I executed the same by arresting the within named John V. Burkes at P. O. Bldg. in the City of New Orleans, La., and have his body now in Court, as within commanded.

H. C. RICHARDSON,
United States Marshal,
By JOSEPH T. SHEA,
Deputy.

Filed Dec. 5, 1939.

60 CAPIAS FOR ROBERT T. BURKES.

$1,000.00 Bond.

District Court of the United States of America,
Eastern District of Louisiana.

The President of the United States of America.

To the Marshal of the United States for the Eastern District of Louisiana—Greeting:

You Are Hereby Commanded to arrest forthwith the body of Robert T. Burkes and him have before our District Court of the United States for the Eastern District of Louisiana, at the City of New Orleans, to answer to an indictment therein found and now pending against him for violation of Emergency Relief Appropriation Act of 1935 (Sec. 9), etc., and to be otherwise dealt with according to law.

Witness, the Honorable Wayne G. Borah, Judge of the District Court of the United States for the Eastern District of Louisiana, this 2nd day of December, A. D. 1939.

A. DALLAM O'BRIEN, JR.,
Clerk.
By N. H. LEWIS,
Deputy Clerk.

61 MARSHAL'S RETURN ON CAPIAS FOR ROBERT T. BURKES.

No. 19843.

Capias.

Received this Capias on the 4 day of Dec., 1939, and on the 4 day of Dec., 1939, I executed the same by ar-

resting the within named Robert T. Burkes at P. O. Bldg. in the City of New Orleans, La., and have his body now in Court, as within commanded.

H. C. RICHARDSON,
United States Marshal,
By JOSEPH T. SHEA,
Deputy.

Filed Dec. 5, 1939.

62 DISMISSAL OF COUNT I.

(Number and Title Omitted.)

Extract from the Minutes.

November Term, 1939.

New Orleans, Monday, January 15th, 1940.

Court met pursuant to adjournment:

Present: Hon. Wayne G. Borah, Judge.

J. Skelly Wright, Esq., Asst. United States Attorney, this day appeared in open Court and stated to the Court that the Government no longer desired to prosecute the defendants, New Orleans Chapter, Associated General Contractors of America, R. P. Farnsworth & Co., Inc., W. Horace Williams Co., Inc., Doullut & Ewin, Inc., Herman T. Makofsky, Lionel F. Favret, Henry Boh, Arthur P. Boh, Summa Caldwell, Monte E. Hart, Theodore A. Pittman, Olin J. Farnsworth, W. Horace Williams, James P. Ewin, John V. Burkes and Robert T. Burkes as regards Count 1 of the Indictment found and presented against them.

Whereupon, and on due consideration thereof, it is Ordered that Count 1 of the Indictment be and the same is hereby dismissed as regards each of the defendants herein, and no further.

PLEAS OF "NOLO CONTENDERE."

(Number and Title Omitted.)

New Orleans Chapter, Associated General Contractors of America, Inc., R. P. Farnsworth & Co., Inc., W. Horace Williams Co., Inc., Doullut & Ewin, Inc., Herman T. Makofsky, Lionel F. Favret, Henry Boh, Arthur P. Boh, Summa Caldwell, Monte E. Hart, Olin J. Farnsworth, W. Horace Williams, James P. Ewin, John V. Burkes and Robert T. Burkes, defendants herein, being this day arraigned at the Bar of the Court, appearing individually and represented by their counsel of record, Eberhard P. Deutsch, Esq., waived the formal reading of the Indictment found and presented against them for violation of Section 9 of the Emergency Relief Appropriation Act of 1935 (Public Resolution No. 11, 74th Congress), and they and each of them entered a plea of "Nolo Contendere" to Count 2 thereof, Count 1 having been dismissed as to each of the defendants on motion of Asst. United States Attorney.

Whereupon, it Ordered that their said pleas of "Nolo Contendere" as to Count 2 be recorded, and it is done accordingly.

63 PLEA OF "NOLO CONTENDERE" AS TO THEODORE A. PITTMAN.

Theodore A. Pittsman, defendant herein, being this day arraigned at the Bar of the Court, appeared in proper person and represented by his counsel of record, G. Wray Gill, Esq., waived the formal reading of the Indictment found and presented against him for violation of Section 9 of the Emergency Relief Appropriation Act of 1935 (Public Resolution No. 11, 74th Congress), and entered a plea of "Nolo Contendere" to Coount 2 thereof, Count 1 having been dismissed on motion of Asst. United States Attorney.

Whereupon, it is Ordered that his said plea of "Nolo Contendere" as to Count 2 be recorded, and it is done accordingly.

64 JUDGMENT AND COMMITMENT.

Filed January 15, 1940.

District Court of the United States, Eastern District, New Orleans Division.

United States
vs. No. 19843 Criminal.
New Orleans Chapter, Associated General Contractors of America, Inc., et al.

Indictment in Two Counts for Violation of U. S. C., Title 18, Sec. 88, and Section 9 Emergency Relief Appropriation Act of 1935.

On this 15 day of January, 1940, came the United States Attorney, and the defendant New Orleans Chapter, Asso-

ciated General Contractors of America, Inc., appearing through its counsel, Eberhard P. Deutsch, and,

The defendant having been convicted on its plea of nolo contendere of the offense charged in the indictment in the above-entitled cause, to-wit: in count two for violation of Section 9, Emergency Relief Appropriation Act of 1935, count one having been dismissed, and the defendant having been now asked whether it has anything to say why judgment should not be pronounced against it, and no sufficient cause to the contrary being shown or appearing to the Court, it is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offense, is hereby fined Two Thousand Dollars ($2,000.00) and that said defendant be further imprisoned until payment of said fine, or fine and costs, or until said defendant is otherwise discharged as provided by law.

It is further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

(Signed) WAYNE G. BORAH,
United States District Judge.

65 JUDGMENT AND COMMITMENT.

Filed January 15, 1940.

District Court of the United States, Eastern District, New Orleans Division.

United States
vs. No. 19843 Criminal.
R. P. Farnsworth & Co., Inc., et al.

Indictment in Two Counts for Violation of U. S. C., Title 18, Sec. 88, and Section 9 Emergency Relief Appropriation Act of 1935.

On this 15th day of January, 1940, came the United States Attorney, and the defendant R. P. Farnsworth & Co., Inc., appearing through its counsel, Eberhard P. Deutsch, and,

The defendant having been convicted on its plea of nolo contendere of the offense charged in the indictment in the above-entitled cause, to-wit: in count two for violation of Section 9, Emergency Relief Appropriation Act of 1935, count one having been dismissed, and the defendant having been now asked whether it has anything to say why judgment should not be pronounced against it, and no sufficient cause to the contrary being shown or appearing to the Court, it is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offense, is hereby fined Two Hundred Dollars ($200.00) and that said defendant be further imprisoned until payment of said fine, or fine and costs, or until said defendant is otherwise discharged as provided by law.

It is further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

(Signed) WAYNE G. BORAH,
Judge.

66 JUDGMENT AND COMMITMENT.

Filed January 15, 1940.

District Court of the United States, Eastern District, New Orleans Division.

United States
vs. No. 19843 Criminal.
W. Horace Williams Co., Inc., et al.

Indictment in Two Counts for Violation of U. S. C., Title 18, Sec. 88, and Section 9 Emergency Relief Appropriation Act of 1935.

On this 15th day of January, 1940, came the United States Attorney, and the defendant W. Horace Williams Co., Inc., appearing through its counsel, Eberhard P. Deutsch, and,

The defendant having been convicted on its plea of nolo contendere of the offense charged in the indictment in the above-entitled cause, to-wit: in count two for violation of Section 9, Emergency Relief Appropriation Act of 1935, count one having been dismissed, and the defendant having been now asked whether it has anything to say why judgment should not be pronounced

against it, and no sufficient cause to the contrary being shown or appearing to the Court, it is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offense, is hereby fined Two Hundred Dollars ($200.00), and that said defendant be further imprisoned until payment of said fine, or fine and costs, or until said defendant is otherwise discharged as provided by law.

It is further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

(Signed) WAYNE G. BORAH,
Judge.

67 JUDGMENT AND COMMITMENT.

Filed January 15, 1940.

District Court of the United States, Eastern District, New Orleans Division.

United States
vs. No. 19843 Criminal.
Doullut & Ewin, Inc., et al.

Indictment in Two Counts for Violation of U. S. C., Title 18, Sec. 88, and Section 9 Emergency Relief Appropriation Act of 1935.

On this 15th day of January, 1940, came the United States Attorney, and the defendant Doullut & Ewin, Inc., appearing through its counsel, Eberhard P. Deutsch, and,

The defendant having been convicted on its plea of nolo contendere of the offense charged in the indictment in the above-entitled cause, to-wit: in count two for violation of Section 9, Emergency Relief Appropriation Act of 1935, count one having been dismissed, and the defendant having been now asked whether it has anything to say why judgment should not be pronounced against it, and no sufficient cause to the contrary being shown or appearing to the Court, it is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offense, is hereby fined Two Hundred Dollars ($200.00) and that said defendant be further imprisoned until payment of said fine, or fine and costs, or until said defendant is otherwise discharged as provided by law.

It is further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

(Signed) WAYNE G. BORAH,
Judge.

68 JUDGMENT AND COMMITMENT.

Filed January 15, 1940.

District Court of the United States, Eastern District, New Orleans Division.

United States
vs. No. 19843 Criminal.
Herman T. Makofsky, et al.

Indictment in Two Counts for Violation of U. S. C., Title 18, Sec. 88, and Section 9 Emergency Relief Appropriation Act of 1935.

On this 15th day of January, 1940, came the United States Attorney, and the defendant Herman T. Makofsky appear-

ing in proper person, and through his counsel, Eberhard P. Deutsch, and,

The defendant having been convicted on his plea of nolo contendere of the offense charged in the indictment in the above-entitled cause, to-wit: in count two for violation of Section 9, Emergency Relief Appropriation Act of 1935, count one having been dismissed and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, it is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offense, is hereby fined Two Hundred Dollars ($200.00), and that said defendant be further imprisoned until payment of said fine, or fine and costs, or until said defendant is otherwise discharged as provided by law.

It is further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

(Signed) WAYNE G. BORAH,
United States District Judge.

69 JUDGMENT AND COMMITMENT.

Filed January 15, 1940.

District Court of the United States, Eastern District, New Orleans Division.

United States
vs. No. 19843 Criminal.
Lionel F. Favret, et al.

Indictment in Two Counts for Violation of U. S. C., Title 18, Sec. 88, and Section 9 Emergency Relief Appropriation Act of 1935.

On this 15th day of January, 1940, came the United States Attorney, and the defendant Lionel F. Favret, appearing in proper person, and through his counsel, Eberhard P. Deutsch, and,

The defendant having been convicted on his plea of nolo contendere of the offense charged in the indictment in the above-entitled cause, to-wit: in count two for violation of Section 9, Emergency Relief Appropriation Act of 1935, count one having been dismissed and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, it is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offense, is hereby fined Two Hundred Dollars ($200.00), and that said defendant be further imprisoned until payment of said fine, or fine and costs, or until said defendant is otherwise discharged as provided by law.

It is further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

(Signed) WAYNE G. BORAH,
Judge.

70 JUDGMENT AND COMMITMENT.

Filed January 15, 1940.

District Court of the United States, Eastern District, New Orleans Division.

United States
vs. No. 19843 Criminal.
Henry Boh, et al.

Indictment in Two Counts for Violation of U. S. C., Title 18, Sec. 88, and Section 9 Emergency Relief Appropriation Act of 1935.

On this 15th day of January, 1940, came the United States Attorney, and the defendant Henry Boh appearing in proper person, and through his counsel, Eberhard P. Deutsch, and,

The defendant having been convicted on his plea of nolo contendere of the offense charged in the indictment in the above-entitled cause, to-wit: in count two for violation of Section 9, Emergency Relief Appropriation Act of 1935, count one having been dismissed and the defendant having been now asked whether he has anything to say why judgment should not be pronounced

against him, and no sufficient cause to the contrary being shown or appearing to the Court, it is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offense, is hereby fined Two Hundred Dollars ($200.00), and that said defendant be further imprisoned until payment of said fine, or fine and costs, or until said defendant is otherwise discharged as provided by law.

It is further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

(Signed) WAYNE G. BORAH,
Judge.

71 JUDGMENT AND COMMITMENT.

Filed January 15, 1940.

District Court of the United States, Eastern District, New Orleans Division.

United States
vs. No. 19843 Criminal.
Arthur P. Boh, et al.

Indictment in Two Counts for Violation of U. S. C., Title 18, Sec. 88, and Section 9 Emergency Relief Appropriation Act of 1935.

On this 15th day of January, 1940, came the United States Attorney, and the defendant Arthur P. Boh, appear-

ing in proper person, and through his counsel, Eberhard P. Deutsch, and,

The defendant having been convicted on his plea of nolo contendere of the offense charged in the indictment in the above-entitled cause, to-wit: in count two for violation of Section 9, Emergency Relief Appropriation Act of 1935, count one having been dismissed and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, it is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offense, is hereby fined Two Hundred Dollars ($200.00); and that said defendant be further imprisoned until payment of said fine, or fine and costs, or until said defendant is otherwise discharged as provided by law.

It is further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

(Signed) WAYNE G. BORAH,
Judge.

72 JUDGMENT AND COMMITMENT.

Filed January 15, 1940.

District Court of the United States, Eastern District, New Orleans Division.

United States
vs. No. 19843 Criminal
Summa Caldwell, et al.

Indictment in Two Counts for Violation of U. S. C., Title 18, Sec. 88, and Section 9 Emergency Relief Appropriation Act of 1935.

On this 15 day of January, 1940, came the United States Attorney, and the defendant Summa Caldwell, appearing in proper person, and through his counsel, Eberhard P. Deutsch, and,

The defendants having been convicted on his plea of nolo contendere of the offense charged in the indictment in the above-entitled cause, to-wit: in count two for violation of Section 9, Emergency Relief Appropriation Act of 1935, count one having been dismissed and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, it is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offense, is hereby fined Two Hundred Dollars ($200.00), and that said defendant be further imprisoned until payment of said fine, or fine and costs, or until said defendant is otherwise discharged as provided by law.

It is further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

(Signed) WAYNE G. BORAH,
United States District Judge.

73 JUDGMENT AND COMMITMENT.

Filed January 15, 1940.

District Court of the United States, Eastern District, New Orleans Division.

United States
vs. No. 19843 Criminal.
Monte E. Hart, et al.

Indictment in Two Counts for Violation of U. S. C., Title 18, Sec. 88, and Section 9 Emergency Relief Appropriation Act of 1935.

On this 15th day of January, 1940, came the United States Attorney, and the defendant Monte E. Hart, appearing in proper person, and through his counsel, Eberhard P. Deutsch, and,

The defendant having been convicted on his plea of nolo contendere of the offense charged in the indictment in the above-entitled cause, to-wit: in count two for violation of Section 9, Emergency Relief Appropriation Act of 1935, count one having been dismissed and the defendant having been now asked whether he has anything to say why judgment should not be pronounced

against him, and no sufficient cause to the contrary being shown or appearing to the Court, it is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offense, is hereby fined Two Hundred Dollars ($200.00), and that said defendant be further imprisoned until payment of said fine, or fine and costs, or until said defendant is otherwise discharged as provided by law.

It is further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

(Signed) WAYNE G. BORAH,
Judge.

74 JUDGMENT AND COMMITMENT.

Filed Jan. 15, 1940.

District Court of the United States, Eastern District,
New Orleans Division.

United States
vs. No. 19843 Criminal.
Theodore A. Pittman, et al.

Indictment in Two Counts for Violation of U. S. C., Title 18, Sec. 88, and Section 9, Emergency Relief Appropriation Act of 1935.

On this 15th day of January, 1940, came the United States Attorney and the defendant Theodore A. Pitt-

man, appearing in proper person, and through his counsel, G. Wray Gill, and,

The defendant having been convicted on his plea of nolo contendere of the offense charged in the indictment in the above-entitled cause, to-wit: in count two for violation of Section 9, Emergency Relief Appropriation Act of 1935, count one having been dismissed, and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, it is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offense, is hereby fined Two Hundred Dollars ($200.00) and that said defendant be further imprisoned until payment of said fine, or fine and costs, or until said defendant is otherwise discharged as provided by law.

It is further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

(Signed) WAYNE G. BORAH,
Judge.

75 JUDGMENT AND COMMITMENT.

Filed Jan. 15, 1940.

District Court of the United States, Eastern District, New Orleans Division.

United States
vs. No. 19843 Criminal.
Olin J. Farnsworth, et al.

Indictment in Two Counts for Violation of U. S. C., Title 18, Sec. 88, and Section 9, Emergency Relief Appropriation Act of 1935.

On this 15th day of January, 1940, came the United States Attorney, and the defendant Olin J. Farnsworth, appearing in proper person, and through his counsel, Eberhard P. Deutsch, and,

The defendant having been convicted on his plea of nolo contendere of the offense charged in the indictment in the above-entitled cause, to-wit: in count two for violation of Section 9, Emergency Relief Appropriation Act of 1935, count one having been dismissed, and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, it is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offense, is hereby fined Two Hundred Dollars ($200.00) and that said defendant be further imprisoned until payment of said fine, or fine and costs, or until said defendant is otherwise discharged as provided by law.

It is further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

(Signed) WAYNE G. BORAH,
Judge.

76 JUDGMENT AND COMMITMENT.

Filed Jan. 15, 1940.

District Court of the United States, Eastern District, New Orleans Division.

United States
vs. No. 19843 Criminal.
W. Horace Williams, et al.

Indictment in Two Counts for Violation of U. S. C., Title 18, Sec. 88, and Section 9, Emergency Relief Appropriation Act of 1935.

On this 15th day of January, 1940, came the United States Attorney, and the defendant W. Horace Williams, appearing in proper person, and through his counsel, Eberhard P. Deutsch, and,

The defendant having been convicted on his plea of nolo contendere of the offense charged in the indictment in the above-entitled cause, to-wit: in count two for violation of Section 9, Emergency Relief Appropriation Act of 1935, count one having been dismissed, and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him,

and no sufficient cause to the contrary being shown or appearing to the Court, it is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offense, is hereby fined Two Hundred Dollars ($200.00) and that said defendant be further imprisoned until payment of said fine, or fine and costs, or until said defendant is otherwise discharged as provided by law.

It is further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

(Signed) WAYNE G. BORAH,
Judge.

77 JUDGMENT AND COMMITMENT.

Filed Jan. 15, 1940.

District Court of the United States, Eastern District, New Orleans Division.

United States
vs. No. 19843 Criminal.
John V. Burkes, et al.

Indictment in Two Counts for Violation of U. S. C., Title 18, Sec. 88, and Section 9, Emergency Relief Appropriation Act of 1935.

On this 15th day of January, 1940, came the United States Attorney, and the defendant, John V. Burkes, ap-

pearing in proper person, and through his counsel, Eber-Eberhard P. Deutsch, and,

The defendant having been convicted on his plea of nolo contendere of the offense charged in the indictment in the above-entitled cause, to-wit: in count two for violation of Section 9, Emergency Relief Appropriation Act of 1935, count one having been dismissed, and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, it is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offense, is hereby fined Two Hundred Dollars ($200.00) and that said defendant be further imprisoned until payment of said fine, or fine and costs, or until said defendant is otherwise discharged as provided by law.

It is further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

(Signed) WAYNE G. BORAH,
Judge.

78 JUDGMENT AND COMMITMENT.

Filed Jan. 15, 1940.

District Court of the United States, Eastern District, New Orleans Division.

United States
vs. No. 19843 Criminal.
Robert T. Burkes, et al.

Indictment in Two Counts for Violation of U. S. C., Title 18, Sec. 88, and Section 9, Emergency Relief Appropriation Act of 1935.

On this 15th day of January, 1940, came the United State Attorney, and the defendant, Robert T. Burkes, appearing in proper person, and through his counsel, Eberhard P. Deutsch, and,

The defendant having been convicted on his plea of nolo contendere of the offense charged in the indictment in the above-entitled cause, to-wit: in count two for violation of Section 9, Emergency Relief Appropriation Act of 1935, count one having been dismissed, and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, it is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offense, is hereby fined Two Hundred Dollars ($200.00) and that said defendant be further imprisoned until payment of said fine, or fine and costs, or until said defendant is otherwise discharged as provided by law.

It is further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

(Signed) WAYNE G. BORAH,
Judge.

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79 OPINION.

Filed December 31st, 1940.

United States District Court, Eastern District of Louisiana.

United States of America on Relation of Samuel Ostrager and Samuel Ostrager in His Own Behalf,

vs. No. 259, Civil Action.

New Orleans Chapter, Associated General Contractors of America, Inc., a Louisiana Corporation, W. Horace Williams Co., Inc., a Louisiana Corporation, Doullut and Ewin, Inc., a Louisiana Corporation, R. P. Farnsworth & Co., Inc., a Delaware Corporation, Herman T. Makofsky, Lionel F. Favret, Henry Boh, Arthur P. Boh, Summa Caldwell, Monte E. Hart, Theodore A. Pittman, Olin J. Farnsworth, W. Horace Williams, James P. Ewin, John V. Burkes, Robert T. Burkes and Arthur Lagarde.

Alexander H. Schullman,
Orloff & Katz,
Katz & Amato,
Attorneys for Plaintiff

Deutsch & Kerrigan,
Attorneys for Defendants.

Norman & Rouchell,
Robert A. Pascal,
Attorneys for Arthur Lagarde, a Defendant.

BORAH, District Judge:

This action was filed on February 1, 1940. The seventeen defendants named herein are the same as those named in the indictment in the case of United States of America vs. New Orleans Chapter, Associated General Contractors of America, Inc., et al, Criminal No. 19843, which was returned in this District and Division on December 2, 1939. The defendants under the indictment, with the exception of Arthur Lagarde as to whom a nolle prosequi was entered, were arraigned on January 15, 1940, and, on pleas of nolo contendere, were fined by the Court, $2,000 for the New Orleans Chapter, Associated General Contractors of America, Inc., and $200 for each of the other defendants.

The complaint in the instant case charges the defendants with having committed the same act for which they were indicted, i. e., of having, with intent to defraud the United States, diverted, attempted to divert, and assisted in diverting for the benefit of the defendants and W. F. Jackson Company certain monies allocated out of the Emergency Relief Appropriation Act of 1935, Supplemental Appropriation Act, fiscal year 1936, and the First Deficiency Appropriation Act of 1936, for the purpose of constructing certain buildings in the City of New Orleans, Louisiana, for the Board of Administrators of the Charity Hospital of Louisiana, at New Orleans, to-wit: the foundation for the Main Building of the said Charity Hospital. The complaint alleges, as did the indictment, that the defendants, being the only bidders on this project, added certain agreed amounts to their bids, portions of which amounts were to be collected and were collected by the successful bidder out of the above mentioned appropriations and were to be paid and were paid to the New Orleans Chapter, Associated General Contractors of America, Inc., and by said Chapter distributed to the defendants and W. F. Jackson Company. In addition, the

complaint alleges that the defendants formed a conspiracy to defraud the United States and charges that in furtherance of the conspiracy the defendants, at a meeting of the Association, adopted a resolution requiring the members to add to bids thereafter submitted the Association fees then in force, regardless of whether such bids were for Government work or not, and it alleges that the defendants agreed that they would add in excess of $7,500 to their bids on the Charity Hospital foundation; it alleges the amount that each of the defendants bid on this job; it alleges that the defendants executed certificates certifying that their bids were genuine and not sham or collusive; and it alleges that the amount of which the Government was defrauded was $7,620. While all of these additional allegations, except that regarding the certificate, were contained in the first count of the indictment as to which a nolle prosequi was entered, none of them were contained in the second count under which the defendants were fined by the Court. However, it is not believed that this makes any difference as the offense alleged in complaint and that alleged in the second count of the indictment are really one and the same; that is, that the United States was defrauded by additions made to the bids for the construction of the foundation of the Charity Hospital.

The relator in the instant case predicates his right to bring this action on Sections 231, 232, 233, 234 and 235 of Title 31, United States Code Annotated. The type of action allowed under these sections is known as a qui tam action. United States vs. Griswold, 24 F. 361. These sections provide, in effect, that, where a person has defrauded the Government by the presentation of a false claim, a suit can be brought and carried on by any person, as well for himself as for the United States, to collect a forfeiture in the sum of $2,000 and, in addition, double the amount of damages which the United States may have

sustained, and that the person bringing the suit and prosecuting it to final judgment shall be entitled to receive one-half the amount of the forfeiture as well as one-half the amount of the damages he shall recover and collect, the other half going to the United States. The relator is here seeking judgment in the amount of $15,240, which is double the amount of which he claims the United States has been defrauded, plus judgment against each of the defendants in the amount of $2,000.

The defendants have answered and all save Arthur Lagarde, who filed a separate answer, have set up a counter-claim for libel, alleging as the basis therefor, that plaintiff in his complaint in the present action, libelled the defendants.

The defendants have now in advance of trial provoked a hearing and the defendants, other than Lagarde have requested the Court to determine the sufficiency of the first and second defenses pleaded in their answer and have moved for a separate trial on their counter-claim. Heard also was plaintiff's motion to dismiss counter-claim of defendants, to have counter-claim stricken and to strike from answer all allegations contained in the second defense and certain allegations of the third defense of defendants' answer. The sufficiency of the first defense pleaded in the answer of Arthur Lagarde was also presented for determination.

The first defense pleaded in the answers is that the complaint fails to state a claim upon which relief can be granted. The second defense pleaded is that the instant proceeding is in effect putting defendants in double jeopardy in violation of the Fifth Amendment to the Constitution of the United States.

There is no merit in the contention that this action should be dismissed for failure to state a claim upon which relief can be granted. However, dismissal as to all defendants with the exception of Lagarde is warranted on other grounds.

There can be slight doubt that a proceeding such as the present one, while civil in form, is criminal in its nature and effect. If this be true it follows that the action in the instant case cannot be maintained, for to allow it to be maintained would be to submit the defendants to double jeopardy.

In United States vs. Shapleigh, 54 F. 126, the Court held that in a suit under Rev. St. Section 3490 (31 U. S. C. A., Section 231) to recover the double damages and forfeiture prescribed against any one presenting a false or fraudulent claim against the United States, the Government must prove its case beyond a reasonable doubt, for the proceeding, while civil in form is criminal in its nature and effect. The Court said, at page 134:

"The United States might have maintained a civil suit for the single damages it sustained, if any, from the wrongful acts of the defendants charged in this complaint without establishing its case beyond a reasonable doubt. Such a suit would have been a civil suit in its nature and purpose as well as in its form. The action at bar is a civil suit in form; but when, under the form of this civil suit, the government sought to punish this defendant for felonies by recovering the penalty of double damages and $2,000 for each offense, it made this proceeding criminal in its nature and purpose, and invoked the application to it of the rules of evidence applicable to criminal trials."

To the same effect, though involving other statutes, see Regan vs. United States, 183 F. 293; Atchison T. & S. F. Railway Co. vs. United States, 173 F. 194.

In United States ex rel. Knight vs. Mellon, et al, 4 F. Supp. 947, (affirmed 71 F. (2d) 1021) at page 949, the Court said:

"Counsel for the plaintiffs have contended that sections 3490, 3491, Rev. St. (31 U. S. C. A., Sec. 231, 232) are remedial statutes, and, as such, are entitled to a quite liberal construction, as opposed to the strict construction to be given a penal statute. With this contention we are unable to agree. The statute is plainly penal in its nature, and is not to be enlarged by implication."

Thus, it will be seen that in cases brought on the relation of an individual, as well as those brought by the Government alone, the Courts have held that the statute under which the instant case is brought is penal in nature, though the action brought is civil in form.

The Courts have been consistent in holding that where a person has been subjected to a criminal prosecution and either convicted or acquitted that another suit, though civil in form, which would subject him to a further penalty for the same acts, cannot be brought against him.

In United States vs. Chouteau, 102 U. S. 603, a distiller and his sureties were sued on a bond, one of the breaches of which was that the distiller had removed spirits from his distillery without first paying the tax thereon. Previous to this suit, two indictments had been found against the distiller on the same grounds, and, on recommendation of the Attorney General, the Government had accepted a specified sum in compromise and satisfaction of the indictments, which thereupon were dismissed and abandoned. The Court held that the compromise was the same in principle as a conviction in the criminal proceeding and that the action was barred. At page 611, the Court said:

"Admitting that the penalty may be recovered in a civil action as well as by a criminal prosecution, it is still as a punishment for the infraction of the law. The term 'penalty' involves the idea of punishment, and its char-

acter is not changed by the mode in which it is inflicted, whether by a civil action or a criminal prosecution. . . . He has been punished . . ., and that should end the present action, according to the principle on which a former acquittal or conviction may be invoked to protect against a second punishment for the same offense."

In the case of United States vs. McKee, 4 Dill. 128, 26 Fed. Cas., page 1116, No. 15688, the defendant had been indicted, convicted, and punished for conspiring with others to defraud the United States by unlawfully removing distilled spirits from their distilleries without the payment of taxes. It was held by the Court that this conviction was a bar to a civil suit to recover the penalty of double the amount of taxes of which the Government had been defrauded by means of the conspiracy, the transactions in both cases being the same. See also, to the same effect, United States vs. Gates, 25 Fed. Cas., page 1263, No. 15,191; Coffey vs. United States, 116 U. S. 436.

Upholding generally this same doctrine is Helvering vs. Mitchell, 303 U. S. 391. This case held that an acquittal of a charge of wilfully attempting to evade the income tax does not bar assessment and collection of a 50% addition to the tax, and that the doctrine of double jeopardy is inapplicable because the 50% addition to the tax is not primarily punitive but is a remedial sanction imposed as a safeguard for protection of the revenue and to reimburse the Government for expense and loss resulting from the taxpayer's fraud. However, Justice Brandeis says, at page 397:

"That acquittal on a criminal charge is not a bar to a civil action by the Government, remedial in its nature, arising out of the same facts on which the criminal proceeding was based has long been settled. Stone vs. United States, 167 U. S. 178; Murphy vs. United States, 272 U. S.

630. Where the objective of the subsequent action likewise is punishment, the acquittal is a bar, because to entertain the second proceeding for punishment would subject the defendant to double jeopardy; and double jeopardy is precluded by the Fifth Amendment, whether the verdict was an acquittal or conviction."

Not precisely in point but quite analogous is United States vs. LaFrance, 282 U. S. 568, 51 Sup. Ct. 278. This was a suit by the United States to collect retail liquor dealers' taxes imposed by laws in effect before the National Prohibition Act but doubled in amount as provided by section of the Prohibition Act where persons sold liquor in contravention of the law. Prior to the commencement of the action, respondent had been convicted and fined upon an information filed by the United States under the Prohibition Act, charging him with the same unlawful sales of intoxicating liquor set forth in the petition as the basis for the imposition of the taxes and penalties sought to be recovered. The Court rested its decision, that this action was barred by the prior conviction, not on the general grounds of double jeopardy, at which it strongly hinted, but upon the provisions of the Willis-Campbell Act (27 U. S. C. A., Sec. 3) that, if any act was a violation of laws in effect before the Prohibition Act and also of the Prohibition Act or of the Willis-Campbell Act, a conviction for such act or offense under one should be a bar to prosecution therefor under the other. In reaching this conclusion, however, the Court was forced to hold that the exaction in question, the double tax, was not a true tax but a penalty involving the idea of punishment for infraction of the law. And Justice Sutherland said, at page 575:

"But an action to recover a penalty for an act declared to be a crime is, in its nature, a punitive proceeding,

although it take the form of a civil action; and the word 'prosecution' is not inapt to describe such an action."

That the acts for which Section 231 of Title 31 allows actions to be brought are declared to be crimes seems clear enough. Section 231 provides: "Any person . . . who shall do or commit any of the acts prohibited by any of the provisions of section 80 of Title 18, shall forfeit, etc." Section 80, in defining the acts of making false claims, etc., provides that persons guilty of such acts shall be fined or imprisoned, or both. This would seem to be a declaration that such acts are crimes.

In the light of the foregoing determinations the present action should be dismissed as to all of the defendants save Arthur Lagarde.

Plaintiff's motion to dismiss the counter-claim of defendants presents the next issue of importance. Plaintiff's motion in the main is predicated on the well established principal that an action for libel based upon alleged defamatory pleadings in the course of a judicial proceeding, may not be maintained until the termination of the judicial proceeding. Especially where as here the parties in the libel action are the very same parties in the judicial proceeding. This is the law of Louisiana. Wolf vs. Royal Ins. Co., et al, 130 La. 679; Manuel vs. Deshotels, et al, 160 La. 652; Robinson Mercantile Co. vs. Freeman (La. App. 1937), 172 So. 797; Thompson vs. Gosserand, 128 La. 1029.

The claim for damages for libel comes in case only after the litigant making the charges has been given an opportunity to prove them in the suit in which they are made. Howard vs. Coyle, 163 La. 257. And since defendants' cause of action for libel cannot accrue until after the termination of the instant proceeding it follows that defendants' counter-claim has been prematurely filed and same is hereby dismissed.

Defendants' motion for a separate trial on their counter-claim accordingly should be overruled, together with plaintiff's motion to have counter-claim stricken and to strike from answer certain allegations with respect to defendants' second and third defenses.

New Orleans, Louisiana, December 31, 1940.

WAYNE G. BORAH,
United States District Judge.

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88 JUDGMENT.

Filed January 7th, 1941.

United States District Court, Eastern District of Louisiana, New Orleans Division.

United States of America on Relation of Samuel Ostrager and Samuel Ostrager in His Own Behalf,

vs. No. 259, Civil Action.

New Orleans Chapter, Associated General Contractors of America, Inc., a Louisiana Corporation, W. Horace Williams Co., Inc., a Louisiana Corporation, Doullut and Ewin, Inc., a Louisiana Corporation, R. P. Farnsworth & Co., Inc., a Delaware Corporation, Herman T. Makofsky, Lionel F. Favret, Henry Boh, Arthur P. Boh, Summa Caldwell, Monte E. Hart, Theodore A. Pittman, Olin J. Farnsworth, W. Horace Williams, James P. Ewin, John V. Burkes, Robert T. Burkes and Arthur Lagarde.

Alexander H. Schullman,
Orloff & Katz,
Katz & Amato,
Attorneys for Plaintiff.

Deutsch & Kerrigan,
Attorneys for Defendants.

Norman & Rouchell,
Robert A. Pascal,
Attorneys for Arthur Lagarde, a Defendant.

This matter was heard and submitted on September 23rd, 1940, on certain defenses contained in the answers filed by defendants and on plaintiffs' motion to dismiss defendants' counter-claim, to have the counter-claim stricken, and to strike from the answer all allegations contained in defendants' second defense and certain of the allegations of defendants' third defense, and was also heard on defendants' motion for a separate trial of their counter-claim.

Now, therefore, after due consideration, and for the written reasons on file,

It is Ordered, Adjudged and Decreed that:

1. Defendants' defense of failure to state a claim upon which relief can be granted, is overruled.

2. Defendants' defense of double jeopardy with reference to all defendants, other than Arthur Lagarde, is maintained, and this suit is dismissed with costs as to all defendants, other than the said Arthur Lagarde.

3. Defendants' counter-claim is dismissed.

4. Defendants' motion for a separate trial on their counter-claim is also overruled.

5. Plaintiffs' motion to strike defendants' counterclaim and to strike certain allegations with reference to defendants' second and third defenses, is overruled.

Approved.

WAYNE G. BORAH,
U. S. Dist. Judge.

NOTICE OF APPEAL ON BEHALF OF PLAINTIFF.

90 Filed March 19, 1941.

United States of America.

District Court of the United States, Eastern District of Louisiana, New Orleans Division.

United States of America on Relation of Samuel Ostrager and Samuel Ostrager in His Own Behalf,
vs. No. 259, Civil Action.
New Orleans Chapter, Associated General Contractors of America, Inc., a Louisiana Corporation, et al.

Notice of Appeal to Circuit Court of Appeals, Fifth Circuit.

To the Defendants in the Above Action, and Their Counsel:

Notice Is Hereby Given that Samuel Ostrager, relator and plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Fifth Circuit, from that part of the decree of the above Court, which maintains defendants' defense of double jeopardy with reference to all

defendants, other than Arthur Lagarde, and which dismisses suit with costs as to all defendants, other than Arthur Lagarde, entered in this action on January 7, 1941.

Dated: March 8, 1941.

ALEXANDER H. SCHULLMAN,
ORLOFF & KATZ, and
KATZ AND AMATO,
By ALEXANDER H. SCHULLMAN,
Attorneys for Appellant.

APPEAL BOND ON BEHALF OF PLAINTIFF.

91 Filed March 28, 1941.

Know All Men By These Presents: That we, Samuel Ostrager, as principal, and New Amsterdam Casualty Company, as surety, are held and firmly bound unto A. Dallam O'Brien, Jr., Clerk, U. S. District Court, Eastern District of Louisiana, in the full and just sum of Two Hundred and Fifty Dollars to be paid to the said A. Dallam O'Brien, Jr., Clerk, U. S. Dist. Court, certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 26th day of March, 1941, in the year of our Lord one thousand nine hundred and forty-one.

Whereas, lately at a session of the United States District Court, holding sessions in and for the Eastern District of Louisiana, in a suit depending in said Court, between United States of America on relation of Samuel

Ostrager and Samuel Ostrager in his own behalf against New Orleans Chapter, Associated General Contractors of America, Inc., etc., et als, a decree was rendered against the said United States of America on relation of Samuel Ostrager and Samuel Ostrager in his own behalf, and the said United States of America on relation of Eamuel Ostrager and Samuel Ostrager in his own behalf having given a notice of appeal and filed a copy thereof in the Clerk's Office of the said Court to reverse the decree in the aforesaid suit, and notice of appeal having been directed to all defendants citing and admonishing them to be and appear before the United States Circuit Court of Appeals for the Fifth Circuit, to be holden at New Orleans, Louisiana, within 30 days from the date of filing of Notice of Appeal.

Now, the condition of the above obligation is such; That if the said Samuel Ostrager shall prosecute his said appeal to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of—

.....,

.....,

.....

SAMUEL OSTRAGER, (Seal)

Per KATZ & AMATO, (Seal)

(Sgd.) J. J. AMATO, (Seal)

Counsel of Record.

NEW AMSTERDAM CASUALTY CO.,

By (Sgd.) LEON IRWIN, JR.,

Attorney-in-Fact.

Approved by—

(Sgd.) WAYNE G. BORAH,

Judge.

NOTICE OF APPEAL ON BEHALF OF DEFENDANTS.

92 Filed March 31, 1941.

In the District Court of the United States in and for the Eastern District of Louisiana, New Orleans Division.

United States of American on Relation of Samuel Ostrager and Samuel Ostrager in His Own Behalf,
vs. No. 259, Civil Action.
New Orleans Chapter, Associated General Contractors of America, Inc., et al.

Notice is hereby given that New Orleans Chapter, Associated General Contractors of America, Inc., Doullut & Ewin, Inc., R. P. Farnsworth & Company, Inc., W. Horace Williams Company, Inc., Arthur P. Boh, Henry Boh, Burkes Bros, John V. Burkes, Robert T. Burkes, Caldwell Bros. & Hart, Summa Caldwell, Verne Caldwell, Monte E. Hart, James P. Ewin, Olin J. Farnsworth, Lionel F. Favret, Pittman Bros. Construction Company, Theodore A. Pittman, Houston C. Pittman, Everett Pittman, Herman T. Makofsky and W. Horace Williams, defendants, hereby appeal to the Circuit Court of Appeals for the Fifth Circuit from those parts of the judgment entered in this action on January 7, 1941, which dismissed defendants' Counter-claims and which overruled defendants' defense that the complaint fails to state a claim against defendants upon which relief can be granted.

R. EMMETT KERRIGAN,
(R. Emmett Kerrigan)
of
DEUTSCH AND KERRIGAN,
Attorneys for Defendants.

17th Floor Hibernia Bank Bldg.,
New Orleans.

93 APPEAL BOND.

Filed March 31st, 1941.

(Title Omitted.)

Know All Men By These Presents: That New Orleans Chapter, Associated General Contractors of America, Inc., Doullut & Ewin, Inc., R. P. Farnsworth & Company, Inc., W. Horace Williams Company, Inc., Arthur P. Boh, Henry Boh, Burkes Bros., John V. Burkes, Robert T. Burkes, Caldwell Bros. & Hart, Summa Caldwell, Verne Caldwell, Monte E. Hart, James P. Ewin, Olin J. Farnsworth, Lionel F. Favret, Pittman Bros. Construction Company, Theodore A. Pittman, Houston C. Pittman, Everett Pittman, Herman T. Makofsky and W. Horace Williams, as principals, and Continental Casualty Company, as surety, are held and firmly bound unto the Clerk of the United States District Court for the Eastern District of Louisiana in the sum of two hundred fifty ($250.00) dollars, to be paid to said Clerk, his successors or assigns, to which payment we bind ourselves, our successors and assign, jointly and severally.

Sealed with our seals and dated this 29th day of March, 1941.

Whereas on January 7, 1941, in the above numbered and entitled action in the District Court of the United States for the Eastern District of Louisiana, a certain judgment was rendered, and the above named principals have duly filed a notice of appeal from certain parts of said judgment;

Now, the condition of this obligation is that if said principals shall prosecute their appeal with effect and pay all costs if the appeal is dismissed or the judgment af-

firmed, or such costs as the Appellate Court may warrant. if the judgment is modified, then this obligation to be void, otherwise to remain in full force and effect.

NEW ORLEANS CHAPTER, ASSOCIATED CONTRACTORS OF AMERICA, INC.,
DOULLUT & EWIN, INC.,
R. P. FARNSWORTH & COMPANY, INC.,
W. HORACE WILLIAMS COMPANY, INC.,
ARTHUR P. BOH,
HENRY BOH,
BURKES BROS.,
JOHN V. BURKES,
ROBERT T. BURKES,
CALDWELL BROS. & HART;
SUMMA CALDWELL,
VERNE CALDWELL,
MONTE E. HART,
JAMES P. EWIN,
OLIN J. FARNSWORTH,
LIONEL F. FAVRET,
PITTMAN BROS. CONSTRUCTION COMPANY,
THEODORE A. PITTMAN,
HOUSTON C. PITTMAN,
EVERETT PITTMAN,
HERMAN T. MAKOFSKY and
W. HORACE WILLIAMS,
By DEUTSCH AND KERRIGAN,
(Deutsch and Kerrigan)
Attorneys.
CONTINENTAL CASUALTY COMPANY,
By EBERHARD P. DEUTSCH,
Attorney-in-Fact.

95 POWER OF ATTORNEY.

Filed March 31st, 1941.

Continental Casualty Company,
Chicago.

Certificate of Authority Individual Attorney-in-Fact.

Know All Men By These Presents: That the Continental Casualty Company, a corporation duly organized under the laws of the State of Indiana, and having its general office in the City of Chicago, and State of Illinois, hath made, constituted and appointed, and does by these presents make, constitute and appoint Ederhard P. Deutsch, of New Orleans, Louisiana, its true and lawful Attorney-in-Fact with full power and authority hereby conferred to sign, seal and execute in its behalf bonds, undertakings and other obligatory instruments of similar nature as follows: Any and all Fidelity and Surety bonds in penalty not exceeding Twenty-five Thousand Dollars ($25,000.00) each, and to bind the Continental Casualty Company thereby as fully and to the same extent as if such instruments were signed by the duly authorized officers of the Continental Casualty Company and all the acts of said Attorney, pursuant to the authority hereby given are hereby ratified and confirmed.

This Power of Attorney is made and executed pursuant to and by authority of the following By-Law adopted by the Board of Directors of the Company at a meeting duly called and held on the 6th day of January, 1937.

"Article XI—Surety Bonds and Undertakings.

Section 2. Appointment of Attorney-in-Fact. The President or any Vice-President may, from time to time, ap-

point by written certificates Attorneys-in-Fact to act in behalf of the Company in the execution of policies of insurance, bonds, undertakings and other obligatory instruments of like nature. Such Attorneys-in-Fact, subject to the limitations set forth in their respective certificates of authority shall have full power to bind the Company by their signature and execution of any such instrument and to attach the seal of the Company thereto. The President or any Vice-President or the Board of Directors may at any time revoke all power and authority prevously given to any Attorney-in-Fact."

In Witness Whereof, the Continental Casualty Company has caused these presents to be signed by its Vice-President and its corporate seal to be hereto affixed this 13th day of August, 1940.

CONTINENTAL CASUALTY COMPANY,
By ROLLIN M. CLARK,
(Seal) Vice-President.

State of Illinois,
County of Cook, ss:

On this 13th day of August, 1940, before me personally came Rollin M. Clark, to me known, who, being by me duly sworn, did depose and say: that he resides in the City of Chicago, State of Illinois; that he is a Vice-President of the Continental Casualty Company, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to the said instrument is such corporate seal; that it was so affixed pursuant to authority given by the Board of Directors of said corporation and that he signed his name thereto pursuant to like authority.

H. McCRILLUS,
(Notarial Seal) Notary Public.

My Commission expires April 9, 1944.

Certificate.

I, J. E. Payne, Assistant Secretary of the Continental Casualty Company, do hereby certify that the attached Power of Attorney dated August 13th, 1940, in behalf of Eberhard P. Deutsch, is a true and correct copy and that same is still in force.

In testimony whereof I have hereunto subscribed my name and affixed the corporate seal of the said Company this ..... day of ....., 19....

J. E. PAYNE,
Assistant Secretary.

MOTION TO SUBSTITUTE PARTY DEFENDANT.

96 Filed April 23rd, 1941.

(Number and Title Omitted.)

On motion of Katz and Amato, attorneys for the Plaintiff and on suggesting to this Honorable Court that:

1.

Defendant, Monte E. Hart, died on September 6, 1940, in the City of New Orleans.

2.

That a succession has been opened in the Civil District Court for the Parish of Orleans, State of Louisiana, bearing No. 236-640.

3.

That his wife, Mrs. Cora Buckman, widow of Monte E. Hart, has been appointed Testamentary Executrix on September 16, 1940, by the Honorable Walter A. Gleason, Judge in Section "D".

4.

It is further suggested to this Honorable Court that under rules of Civil Procedure for the District Courts of the United States and particularly Rule 25, your petitioner desires that the Testamentary Executrix, Mrs. Cora Buckman, widow of Monte E. Hart be substituted as proper party defendant for the late, Note E. Hart.

Wherefore, Movers pray that after due proceedings had, that this Honorable Court substitute Mrs. Cora Buckman, Testamentary Executrix of the Succession of the late Monte E. Hart, as proper party defendant in the above entitled and numbered cause.

(Sgd.) JACOB J. AMATO,
KATZ & AMATO,
(Katz & Amato)
Attorneys for Plaintiff.

1019 Carondelet Building,
New Orleans, Louisiana.

Served on Defendant Counsel, April 24, 1941.
(Sgd.) JACOB J. AMATO.

97 NOTICE OF MOTION.

To: Deutsch and Kerrigan, Esqs.,
Mr. Emmett R. Kerrigan,
Hibernia Bank Building,
New Orleans, Louisiana,
Attorneys for Defendants.

Please take notice, that the undersigned will bring the above motion for hearing before the Court of the Honorable Wayne Borah, Judge of the District Court of the United States in and for the Parish of Orleans, State of Louisiana, at the Post Office Building, New Orleans, Louisiana, on the 30th day of April, 1941, at 10 A. M. o'clock in the forenoon on that day or as soon thereafter as counsel can be heard.

(Sgd.) JACOB J. AMATO,
Attorney for Plaintiff.
KATZ & AMATO,
(Katz & Amato)
Attorneys at Law.

1019 Carondelet Bldg.,
New Orleans, Louisiana.

MOTION FOR SUBSTITUTION OF PARTIES.

98 Filed April 23, 1941.

(Number and Title Omitted.)

On motion of Katz and Amato, attorneys for the plaintiff, and on suggesting to this Honorable Court that:

1.

On January 10, 1941, Caldwell Bros. & Hart, in ordinary partnership, the defendant in the above cause and

numbered matter, filed a proceeding in the Civil District Court No. 238-169 for a judicial liquidation.

2.

That the ordinary partnership of Caldwell Bros. & Hart was composed of Summa Caldwell, of New Orleans, Verna Caldwell, of Erath, and Monte E. Hart, of New Orleans.

3.

That Summa Caldwell and Verna Caldwell each were the owners of one-fourth (¼) of the said partnership, and Monte E. Hart was the owner of the other one-half (½) of the said partnership.

4.

That a petition was filed by Mrs. Cora Buckman, widow of Monte E. Hartt, appointed Testamentary Executrix of the Succession of Monte E. Hart, bearing No. 236-640 in the Civil District Court for the said liquidation.

5.

That on January 13, 1941, Sidney Bourgeois and Louis H. Pilie were both appointed as joint liquidators by that Honorable Court.

6.

And that Warren Doyle, Donald Doyle, and the law firm of Odgen and Wood, and Edmond E. Talbot were also appointed by that Honorable Court as attorneys for the said liquidation.

7.

Your movers further suggest that under rules of Civil Procedure of the District Courts of the United States and in particular under Rule 25, your movers at this time suggest to this Honorable Court to substitute Sidney Bourgeois and Louis H. Pilie, joint liquidators, for Caldwell Bros. & Hart, ordinary partnership, as proper party defendants herein.

Wherefore, movers pray that after due proceedings had, that Sidney Bourgeois and Louis H. Pilie, joint liquidators of the judicial liquidation of Caldwell Bros. & Hart, ordinary partnership, be substituted as proper party defendants in the above cause and numbered matter.

(Sgd.) JACOB J. AMATO,
KATZ & AMATO,
Attorneys for Plaintiff.

1019 Carondelet Bldg.,
New Orleans, La.

Served on defendant counsel in person, on April 24, 1941.

(Sgd.) JACOB J. AMATO.

---

99 NOTICE OF MOTION.

Filed April 23, 1941.

(Number and Title Omitted.)

To: Deutsch & Kerrigan, Esq.,
Mr. Emmett R. Kerrigan,
Hibernia Bank Building,

New Orleans, Louisiana,
Attorneys for Defendants.

Please take notice, that the undersigned will bring the above motion for hearing before the Court of the Honorable Wayne Borah, Judge of the District Court of the United States in and for the Parish of Orleans, State of Louisiana, at the Post Office Building, New Orleans, Louisiana, on the 30th day of April, 1941, at 10 A. M. o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

(Sgd.) JACOB J. AMATO,
Attorney for Plaintiff.
(Sgd.) KATZ & AMATO,
(Katz & Amato)
Attorneys at Law.

1019 Carondelet Bldg.,
New Orleans, Louisiana.

---

100 EXHIBIT FILED IN DISTRICT COURT APRIL 30th, 1941.

State of Louisiana.

Civil District Court for the Parish of Orleans.

Letters Testamentary.

No. 236-640. Division "B".

Succession of Monte E. Hart.

Filed September 18th, 1940.

(Sgd.) JOHN B. SCANLAN,
Deputy Clerk.

To All Whom These Presents May Come—Greeting:

Whereas, Mrs. Cora Buckman, widow of Monte E. Hart, named and appointed Testamentary Executrix of the Last

Will and Testament of the late Monte E. Hart, Deceased, has applied to the Civil District Court for the Parish of Orleans by Petition praying said Court to grant Letters Testamentary therein.

Now Know Ye, That the said Mrs. Cora Buckman, widow of Monte E. Hart, is hereby authorized and empowered to collect all the goods and effects which are of said above named succession deceased, and to make a just inventory thereof, and all other lawful acts to do and perform as Testamentary Executrix of the said last Will and Testament.

Witness our hand and the Seal of said Court, at the City of New Orleans, this 18th day of September, in the year of our Lord one thousand nine hundred and Forty and the 165th of the Independence of the United States of America.

(Sgd.) WALTER L. GLEASON,
Judge.

A true copy.

(Sgd.) JNO. B. SCANLAN,
Deputy Clerk, Civil District Court, Parish of Orleans, State of La.

(Seal)

(Sgd.) JNO. B. SCANLAN,
Deputy Clerk.

101 EXHIBIT FILED IN DISTRICT COURT APRIL 30th, 1941.

State of Louisiana.

Civil District Court for the Parish of Orleans.

No. 238,169. Division "E". Docket 5.

In Re: Judicial Liquidation of Caldwell Brothers & Hart.

Filed January 14, 1941.

(Sgd.) T. S. BUCKLEY,
Deputy Clerk.

This shall certify to all whom it may Concern, That on the 10th day of January, in the year of our Lord one thousand nine hundred and forty-one, and the one hundred and sixty--fifth of the independence of the United States of America, an application was made to the Honorable Walter L. Gleason, Acting Judge of the Civil District Court for the Parish of Orleans, Division "E", by Mrs. Cora B. Hart, Executrix of the Estate of Monte E. Hart, and Vernon Caldwell and Summa Caldwell, praying that Sidney S. Bourgeois, Jr., and Louis H. Pilie, be appointed joint Liquidations.

Now, Know Ye, That Sidney S. Bourgeois, Jr., and Louis H. Pilie have been and they hereby appointed and confirmed as Joint Liquidators of the said partnership of Caldwell Brothers & Hart, and that they have fulfilled all requisites of law.

--Witness our hand and Seal of said Court at the City of New Orleans this 14th day of January in the year of our

Lord one thousand nine hundred and forty-one and the 165th of the independence of the United States of America.

(Sgd.) WALTER L. GLEASON,
Judge.

(Sgd.) T. S. BUCKLEY.

A True Copy.

(Sgd.) T. BUCKLEY,
Deputy Clerk, Civil District Court, Parish of Orleans, State of Louisiana.

(Seal)

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102 HEARING ON MOTIONS TO SUBSTITUTE PARTY DEFENDANTS.

(Number and Title Omitted.)

Extract from the Minutes.

February Term, 1941.

New Orleans, Wednesday, April 30, 1941.

Court met pursuant to adjournment;

Present: Hon. Wayne G. Borah, Judge.
Hon. A. J. Caillouet, Judge.

Borah, J.:

This cause came on this day to be heard upon:

1. Motion by plaintiff to substitute Mrs. Cora Buckman, Testamentary Executrix of the Succession of Monte M. Hart, as proper party defendant;

2. Motion by plaintiff to substitute Sidney Bourgeois and Louis H. Pilie, Joint Liquidators of Caldwell Bros. & Mart, as parties defendant.

Present:

Jacob J. Amato,

Of Counsel for the Plaintiff;

Warren Doyle,

Attorney for the Mrs. Cora Buckman, Executrix, and Sidney Bourgeois and Louis H. Pilie, Liquidators;

Absent:

Deutsch & Kerrigan,

Attorneys for Defendants, but submitting same.

Whereupon, after hearing statements of counsel present to the effect that there were no objections to the motions herein,

It is Ordered that the same be made absolute.

STATEMENT OF POINTS TO BE RELIED ON, AND DESIGNATION OF CONTENTS.

103 Filed April 16, 1941.

(Title Omitted.)

Statement of Points to be Relied on and Parts of the Record which Appellant Thinks Necessary for the Consideration thereof:

The Appellant intends to rely upon the errors of the United States District Court as follows:

1.

The United States District Court erred in entering a decree maintaining the defense of double jeopardy interposed by the defendants and dismissing plaintiff's action on that ground.

2.

The United States District Court erred in hearing and determining the defendants' plea of double jeopardy without a trial on the issues of fact involved.

3.

The United States District Court erred in sustaining the plea of double jeopardy interposed as a defense to plaintiff's qui tam action.

Pursuant to Civil Procedure Rule 75 A the Clerk is requested to prepare that portion of the transcript that is necessary.

1. Complaint.
2. Answer.
3. Motion to dismiss counter-claim.
4. Notice of motion to dismiss counter-claim.
5. All minute entrances.
6. Opinion.
7. Judgment.

8. Notice of Appeal.

9. Note of Evidence filed on hearing of Motions on September 23, 1940.

10. U. S. of America vs. N. O. Chapter of Associated General Contractors of America, et als, Criminal Docket #19-843.

11. Notice of Appeal of Defendants.

Dated: April 5, 1941.

KATZ & AMATO,
ORLOFF & KATZ, and
ALEXANDER H. SCHULLMAN,
By ALEXANDER H. SCHULLMAN,
Attorneys for Plaintiff and
Appellant.

April 16, 1941.

Service accepted.
DEUTSCH AND KERRIGAN,

---

105 SUPPLEMENTAL PRAECIPE.

Filed May 2nd, 1941.

(Number and Title Omitted.)

Pursuant to Civil Procedure Rule 75 A the Clerk is requested to prepare the following supplemental portions of the transcript that is necessary; supplementing the request filed April 5, 1951.

12. Motions to substtute party defendants.

13. Letter of joint liquidators and Testamentary Executrix filed on April 30, 1941.

14. Judgment substituting party defendants.

(Sgd.) KATZ & AMATO,
(Katz & Amato)
JACOB J. AMATO,
Attorneys for Plaintiff and Appellant.

106 CLERK'S OFFICE.

I, A. DALLAM O'BRIEN, JR., Clerk of the District Court of the United States for the Eastern District of Louisiana, do hereby certify that the foregoing 105 pages contain and form a full, true and complete transcript of the record, in the case entitled "United States of America on relation of Samuel Ostrager and Samueel Ostrager in his own behalf versus New Orleans Chapter, Associated General Contractors of America, Inc., et al", No. 259 of the Civil Action Docket of this Court, as made up in accordance with the Designation of Contents copied herein.

Witness my Hand and the seal of said Court at the City of New Orleans, La., this 8th day of May, A. D. 1941.

A. DALLAM O'BRIEN, JR.,
Clerk,
By H. W. NIEHUES,
(H. W. Niehues)
Deputy Clerk.

(Seal)

[fol. 114] That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

ARGUMENT AND SUBMISSION

Extract from the Minutes of March 25th, 1942

No. 9940

UNITED STATES OF AMERICA on relation of Samuel Ostrager and Samuel Ostrager in his own behalf

versus

NEW ORLEANS CHAPTER, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., et al. (and Reverse Title)

On this day this cause was called, and, after argument by Julius Katz, Esq., for appellant and appellee, and Eberhard P. Deutsch, Esq., for appellees and appellants, was submitted to the Court.

[fol. 115] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 9940

UNITED STATES OF AMERICA ON RELATION OF SAMUEL OSTRAGER, AND SAMUEL OSTRAGER, IN HIS OWN BEHALF, Appellant,

versus

NEW ORLEANS CHAPTER, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., et al. (and Reverse Title), Appellees

Appeals from the District Court of the United States for the Eastern District of Louisiana

OPINION OF THE COURT—Filed April 15, 1942

Before Hutcheson, Holmes, and McCord, Circuit Judges

McCord, Circuit Judge: The appellant, Samuel Ostrager, an informer, brought a *qui tam* action on behalf of the United States of America and on behalf of himself to re-

cover from the appellees statutory forfeitures and double [fol. 116] damages under the provisions of 31 United States Code §§231, 232, 233, 234 and 235. These sections provide that where the United States has been defrauded by presentation of a false claim "upon or against the Government of the United States, or any department or officer thereof", suit may be brought and carried on by "any person, as well for himself as for the United States", to collect a forfeiture of $2,000.00 and, in addition, double the amount of damages which the United States may have sustained; and that the person bringing such suit and prosecuting it to final judgment "shall be entitled to receive one-half the amount of such forfeiture, as well as one-half the amount of damages he shall recover and collect."

The informer's complaint charges seventeen named defendants with having committed the same acts for which they had been previously indicted. The indictment, in substance, charged that the defendants had, with intent to defraud the United States, diverted, attempted to divert, and assisted in diverting for the benefit of themselves and another certain monies allocated out of the Emergency Relief Appropriation Act of 1935, Supplemental Appropriation Act, fiscal year 1936, and the First Deficiency Appropriation Act of 1936, for the purpose of constructing in the City of New Orleans, Louisiana, certain buildings for the Board of Administrators of the Charity Hospital of Louisiana, at New Orleans, to-wit: the foundation for the main building of the Charity Hospital. On January 15, 1940, the first count of the indictment, the conspiracy count, was nol-prossed; the second count was nol-prossed as to one defendant, and the other defendants entered pleas of *nolo contendere* and were fined by the court, $2,000.00 for the New Orleans Chapter, Associated General Contractors of America, Inc., and $200.00 for each of the other defendants. Shortly thereafter and on February 1, 1940, this informer's complaint was filed. The complaint alleges, as did the in- [fol. 117] dictment, that the defendants, being the only bidders on the Charity Hospital project, added certain agreed amounts to their bids, portions of which amounts were to be collected, and were collected, by the successful bidder out of the above-mentioned appropriations, and were to be paid, and were paid, to the New Orleans Chapter, Associated General Contractors of America, Inc., and by said

chapter distributed to the defendants and another. The complaint further alleges that the defendants formed a conspiracy to defraud the United States; that in furtherance of the conspiracy, the defendants, at a meeting of the Association, adopted a resolution requiring members to add to bids thereafter submitted the Association fees then in force, regardless of whether such bids were for government work or not; that defendants agreed to add in excess of $7,500.00 to their bids on the Charity Hospital foundation; that each defendant submitted a bid on the job and submitted certificates certifying that their bids were not sham or collusive; and that the government was defrauded in the amount of $7,620.00. The relator thereby sought to recover judgment for $15,240.00, double the amount of damages alleged to have been sustained by the government, plus a $2,000.00 forfeiture against each of the defendants.

The defendants interposed three defenses: The first defense was that the complaint failed to state a claim against defendants upon which relief could be legally granted. The second defense was that, contrary to the Fifth Amendment to the Constitution of the United States, the defendants were being twice put in jeopardy for the same offense. The third defense consisted of an answer on the merits which denied the essential allegations of the complaint. The defendants also filed a counterclaim by which they sought recovery from the informer for alleged libel contained in the complaint.

[fol. 118] In advance of trial the defendants provoked a hearing and requested the court to pass upon their first and second defenses, and moved for a separate trial on their counterclaim. At the hearing the court also heard the relator's motion to dismiss the counterclaim, to have the counterclaim stricken, and to strike all allegations contained in the second defense and certain other allegations contained in the third defense. The court found that there was no merit in the defense that the complaint failed to state a claim upon which relief could be granted. The court, however, sustained the second defense of double jeopardy and dismissed the complaint. The counterclaim was also dismissed as being premature. Both sides have appealed.

There is a divergence of opinion as to what does and what does not constitute double jeopardy in cases of this kind, and there are authorities which lend strong weight

to the view that such actions while civil in form are criminal in their nature and effect, and that a former acquittal or conviction may be invoked to bar recovery in a proceeding under the informer statutes. See and compare *United States v. La Franca*, 282 U. S. 568; *Helvering v. Mitchell*, 303 U. S. 391; *Coffey v. United States*, 116 U. S. 436; *United States v. Glidden Co.*, 78 F. 2d 639; *Marcus v. Hess*, 41 F. Supp. 197, reversed on other grounds, — F. 2d —; *United States v. Shapleigh*, 54 Fed. 126; *United States v. McKee*, 4 Dill. 128, 26 Fed. Cases 1116; *Olson v. Mellon*, 4 F. Supp. 947, affirmed 71 F. 2d 1021.

We prefer, however, to rest decision upon the contention that the complaint failed to state a claim against the defendants upon which relief could be legally granted under the statutes relied upon. The statutes involved must be strictly construed, and they permit recovery by an informer only when it is shown that the defendants have presented [fol. 119] a "claim upon or against the Government of the United States, or any department or officer thereof knowing such claim to be false, fictitious, or fraudulent." 31 U. S. C. §231.

Nowhere does the informer's complaint charge or allege that any false or fraudulent claim was made to, upon, or against the Government of the United States, or any department or officer thereof. Indeed, it is without dispute that the contract which was entered into and signed after the submission of bids was by and between the defendants and the Board of Administrators of the Charity Hospital of Louisiana, at New Orleans, a state board or agency. The successful bidder had no contract with the United States, and the mere fact that the project was financed in part by a federal grant to a state agency in no wise makes the Government of the United States a party to the contract for purposes of this suit. A claim against the United States could not be made by the contractor, for he had no contract with the government and he had no right to demand money from it. The Board of Administrators of the Charity Hospital of Louisiana, at New Orleans, were the only parties who promised to pay the contractor, and he could look solely to this source for payment. Where the Board of Administrators secured the funds to pay the contractor is not material here. The claim of the defendants was against the Board, they had no claim against the United States, and

since no allegation is made in this complaint that a claim had been or could be made by the defendants against the government, this relator was not entitled to recover under these statutes and the complaint should have been dismissed. *United States ex rel. Marcus v. Hess*, 3 Circuit, No. 7841, decided March 23, 1942, reaffirmed March 26, 1942, — F. 2d —; Cf. *Mandel v. Cooper Corporation*, 42 F. Supp. 317.

It is the law of Louisiana that an action for damages for libel based on defamatory pleadings may not be main-[fol. 120] tained until termination of the judicial proceeding. Having dismissed the relator's complaint, the court committed no error in dismissing the defendants' cross-complaint and counterclaim. *Wolf v. Royal Ins. Co.*, 130 La. 679; *Manuel* v. *Deshotels*, 160 La. 652, 107 So. 478; *Robinson v. Freeman*, 172 So. 797; *W. B. Thompson & Co. v. Gosserand*, 128 La. 1029; *Howard v. Coyle*, 163 La. 257.

On both appeals the judgment is affirmed.

[fol. 121] JUDGMENT

Extract from the Minutes of April 15th, 1942

No. 9940

UNITED STATES OF AMERICA on relation of Samuel Ostrager and Samuel Ostrager in his own behalf,

versus

NEW ORLEANS CHAPTER, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., et al.

(and Reverse Title)

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Louisiana, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause on both appeals be, and the same is hereby, affirmed;

It is further ordered and adjudged that Samuel Ostrager, appellant, and the surety on his appeal bond herein, New Amsterdam Casualty Company, be condemned, in solido,

to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

[fol. 122] MOTION AND ORDER STAYING MANDATE — Filed May 5, 1942

IN THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

No. 9940

UNITED STATES OF AMERICA on relation of Samuel Ostrager and Samuel Ostrager in his own behalf,

versus

NEW ORLEANS CHAPTER, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., et al.

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Fifth Circuit:

On motion of Samuel Ostrager, appearing herein through his undersigned counsel, Jacob J. Amato, and on suggesting to this Honorable Court that the mandate that is returnable on May 6, 1942 be stayed.

The plaintiff, through his undersigned counsel, are proceeding directly by petition for a Writ of Certiorari to the United States Supreme Court.

Wherefore, movers pray that this Honorable Court stay the mandate and for all general and equitable relief.

(Signed) Jacob J. Amato.

I hereby certify that a copy has been served upon the opposing counsels.

(Signed) Jacob J. Amato.

[fol. 123] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH DISTRICT

No. 9940

UNITED STATES OF AMERICA on relation of Samuel Ostrager and Samuel Ostrager in his own behalf
Appellant & Appellee,

vs.

NEW ORLEANS CHAPTER, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., et al., Appellees & Appellants

(and Reverse Title)

On Consideration of the Application of the appellant and appellee in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable him to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, It Is Ordered that the issue of the mandate of this court in said cause be and the same is stayed for a period of thirty days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from the date of this order there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that the certiorari petition and record have been filed, and that due proof of service of notice thereof under Paragraph 3 of Rule 38 of the Supreme Court has been given. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from the date of this order, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

Done at New Orleans, La., this 5th day of May, 1942.

(Signed) Leon McCord, United States Circuit Judge.

[fol. 124] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 125] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1942

No. 236

ORDER ALLOWING CERTIORARI—Filed October 12, 1942

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted, and the case is assigned for argument immediately following case No. 173, United States ex rel. Marcus vs. Hess.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office - Supreme Court, U. S.
FILED
JUL 15 1942
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term 1942

No. 236

UNITED STATES OF AMERICA ON RELATION OF SAMUEL OSTRAGER, and SAMUEL OSTRAGER, in his own behalf,

Petitioners,

vs.

NEW ORLEANS CHAPTER, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BURNETT WOLFSON,
WILLIAM KATZ,
215 West Fifth Street, Los Angeles,
Attorneys for Petitioners.

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IN THE

Supreme Court of the United States

October Term 1942

No. .....

UNITED STATES OF AMERICA ON RELATION OF SAMUEL OSTRAGER; and SAMUEL OSTRAGER, in his own behalf,

Petitioners,

vs.

NEW ORLEANS CHAPTER, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Your petitioners, the United States of America *ex rel.* Samuel Ostrager and Samuel Ostrager in his own behalf, respectfully pray that a writ of certiorari be issued to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit, entered in the above cause on April 15, 1942, affirming the judgment of the United States District Court for the Eastern District of Louisiana, dismissing plaintiffs' (petitioners') suit.

Opinion Below.

The opinion of the District Court maintaining the defense of double jeopardy, interposed by defendants (respondents) and dismissing said action [R. 81] appears not to have been reported. The opinion of the Circuit Court of Appeals [R. 115] is reported in 127 F. 2d 649.

Jurisdiction.

The judgment of the Circuit Court of Appeals sought to be reviewed was entered on April 15, 1942.. [R. 115.] The jurisdiction of this court is invoked under section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Preliminary Statement.

Petitioner by his complaint sought to recover on behalf of the United States as well as himself double damages and penalties sustained as the result of the admittedly collusive bidding on a contract secured by respondents to perform work on a municipally sponsored PWA project. The respondents had previouslyl been indicted in two counts. [R. 25.] By the first count of the indictment brought under section 88 of the T. 18, U.S. C.A., respondents were charged with a conspiracy to defraud the United States and to violate section 9 of the Emergency Relief Appropriation Act. [R. 26-34.] By the seecond count of the indictment respondents were charged with violating section 9 of the Emergency Relief Appropriation Act of 1935. [R. 34-37.] Count one was dismissed [R. 59], and a plea of *nolo contendere* was entered on count 2 of the indictment.

Respondents by their answer to petitioners' complaint pleaded three defenses. The first defense alleged that the complaint fails to state a claim against defendants upon which relief can be granted. [R. 12.]

The second defense alleged that defendants, by reason of their indictment and conviction under plea of *nolo contendere* were being twice put in jeopardy for the same offence.

The third defense consisted of admissions and denials of certain paragraphs and parts of certain of petitioners' complaint.

Responents, by their counter-claim, sought to recover from petitioner damages for the alleged libel contained in his complaint.

In advance of trial, respondents provoked a hearing and requested the court to pass upon their first and second defense and moved for a separate trial on their counter-claim. [R. 22; 85; 91.] At said hearing the court also heard petitioners' motion to dismiss the counter-claim, to strike respondents' second defense and certain of the allegations contained in the third defense. [R. 19-20.]

Thereafter, the court filed its written opinion [R. 81] and judgment [R. 90] (a) overruling respondents' defense of failure to state a cause of action upon which relief can be granted, (b) maintaining respondents' defense of double jeopardy and dismissing petitioners' suit; (c) dismissing respondents' counter-claim; (d) overruling respondents' motion for a separate trial on their counter-claim, and (e) overruling plaintiff's motion to strike respondents' counter-claim, second defense and certain allegations of the third defense.

Both sides appealed from said judgment and the judgment on both appeals was affirmed. On the appeal taken by petitioners, the judgment was affirmed on the ground that "the complaint failed to state a claim against the defendants upon which relief could be legally granted under the statutes relied upon." [R. 118.]

Question Presented.

The broad question here is whether petitioners' complaint stated a claim against respondents on behalf of the United States for double damages and penalties on account of respondents' fraud, under one or more of the first three clauses of R.S. 5438. The question is therefore presented under each clause as follows:

1. LIABILITY UNDER FIRST CLAUSE OF STATUTE:—Whether in a suit on behalf of the United States for damages and penalties, an admittedly fraudulent contractor's claim approved by a federal officer and paid out of United States (WPA) funds is not actionable under the first clause of R.S., Sec. 5438, as a "claim upon or against the Government of the United States, or any department or officer thereof"?

2. LIABILITY UNDER SECOND CLAUSE.—Whether the making and presentation by a defendant contractor of fraudulent claims and false certificates of non-collusive bidding, used by a municipality to aid it in obtaining payment of a grant to such municipality of United States (PWA) funds for the purpose of paying such contractor's claims, is not actionable as against such contractor under the second clause of R.S., Sec. 5438, which imposes liability upon "every person * * * who * * * makes, uses, or causes to be * * * used, any false * * * claim (or) certificate" for the purpose "of obtaining or aiding to obtain the payment or approval of" a claim against the United States?

3. LIABILITY UNDER THIRD CLAUSE.—Whether the presentation of fraudulent contractors' claims addressed to the municipal sponsor of a PWA project for payment from federal PWA funds in the hands of such sponsor —all in furtherance of a conspiracy to defraud the United States—is not actionable under the third clause of R.S., 5438, which imposes liability upon any person who enters into "any agreement, combination, or conspiracy to defraud the Government of the United States" by obtaining the allowance of "any claim," whether against the United States or against a third party, where the effect is to defraud the United States.

Statutes Involved.

Revised Statutes, Sec. 5438:

> Every person (1) who makes or causes to be made, or presents or causes to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or (2) who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or (3) who enters into any agreement, combination, or conspiracy to defraud the Government

of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim * * * shall be imprisoned at hard labor for not less than one or more than five years, or fined not less than one thousand nor more than five thousand dollars.

Revised Statutes, Sec. 3490:

Any person not in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States, who shall do or commit any of the acts prohibited by any of the provisions of section fifty-four hundred and thirty-eight, Title "CRIMES," shall forfeit and pay to the United States the sum of two thousand dollars, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit.[1]

Revised Statutes, Secs. 3491 and 3493, authorizing *qui tam* proceedings to enforce the liability imposed by R.S., Sec. 3490, are printed in the Appendix.

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[1] Because R.S., Sec. 3490, imposed the liability enforceable in *qui tam* proceedings under R.S., Sec. 3491, only for acts in violation of the prohibitions contained in R.S., Sec. 5438, at the time of the enactment of R.S., Sec. 3490, and its incorporation of R.S., Sec. 5438, in 1874, the conduct and acts giving rise to a cause of action under R.S., Sec. 3490, must be measured by the language of R.S., Sec. 5438, as if originally read at the date of the enactment of R.S., Sec. 3490, and not as later amended. *Olson v. Mellon*, 4 F. Supp. 947, aff'd 71 F. 2d 1021, cert. denied 293 U.S. 615.

While R.S., Sec. 5438, was later amended (see 18 U.S.C. Secs. 80, 83), the scope of R.S., Sec. 3490, which incorporated it in the year 1874 remains intact and unaffected. *Kendall v. United States*, 12 Pet. 524, 625; *In re Heath*, 144 U.S. 92, 93, 94.

Statement.

On February 1, 1940, the petitioner on behalf of the United States, as well as in his own behalf, brought this action in the Eastern District of Louisiana against seventeen (17) defendants to recover the penalties and double damages, provided by R.S. Sec. 3490, resulting from acts in furtherance of a conspiracy to defraud the United States in violation of R.S. 5438.

The complaint charged that the defendants were engaged in the business of general contractors in and about New Orleans, Louisiana, and were members of defendant New Orleans Chapter, Associated General Contractors of America, Inc. [R. 3-4]; that all of said defendants, none of whom were in the military or naval forces of the United States [R. 4] entered into a conspiracy to defraud and otherwise injure the United States [R. 7]; that in pursuance of said conspiracy, the defendants, on January 6, 1937, at a regular meeting of the members of defendant New Orleans Chapter, Associated General Contractors of America, Inc., at New Orleans, Louisiana, adopted a resolution requiring each member to add to the amount of each bid thereafter offered and submitted by him the association fees then in force, regardless of whether such bid was on construction work for federal or state governments or otherwise [R. 7]; that in pursuance of said conspiracy, the defendants, except defendant New Orleans Chapter, Associated General Contractors of America, Inc., and one W. F. Jackson, on April 12, 1937, at New Orleans, entered into an agreement that they would add in excess of $7500.00 to all bids submitted, representing estimating, quantity surveying and chapter fees of all bidders, on the contracts

for the foundation work for the main building of the Charity Hospital at New Orleans, Louisiana, and that the successful bidder would pay such excesses to the defendant New Orleans Chapter, Associated General Contractors of America, Inc., for the use and benefit of and to be distributed to the defendants, including defendant New Orleans Chapter, Associated General Contractors of America, Inc. [R. 7-8]; that the Congress of the United States had theretofore enacted the Emergency Relief Appropriation Act of 1935, Supplemental Appropriation Act Fiscal Year 1936 and the First Deficiency Appropriation Act of 1936, to relieve destitution, provide relief, create increased employment and to provide useful public works [R. 5-6]; that pursuant to such Acts and Resolutions and the orders and rules promulgated under their authority, certain sums of money were appropriated for the purposes declared in the Act [R. 6]; that out of the sums so appropriated, the United States of America, through the Federal Emergency Administration of Public Works (commonly referred to as the Public Works Administration) made a grant of money not to exceed $715,380.00 to the Board of Administrators of the Charity Hospital of Louisiana at New Orleans, to aid in the construction of the foundation of the main building of said hospital, said project being known as Docket Number 4529 R and 4529 D [R. 6]; that for the purpose of letting the contracts for the construction work in connection with said project, the Board of Administrators of the Charity Hospital of Louisiana at New Orleans, advertised and called for bids from persons, including the defendants herein, seeking to obtain construction contracts for the performance of the work called for in the project [R. 6];

that defendants, pursuant to the conspiracy and in furtherance thereof, falsely and fraudulently submitted bids [R. 10]; that the defendants and W. F. Jackson Co. were the only bidders for the construction of the foundaation for the main building of the Charity Hospital of Louisiana at New Orleans [R. 8]; that the bids submitted by defendants and W. F. Jackson Co. (the respective amounts of which bids are specifically alleged in the complaint) included the excess amounts which the defendants had theretofore agreed to add to their bids [R. 8-9]; that defendants, in carrying out the conspiracy, falsely and fraudulently executed and delivered or caused to be executed and delivered certain certificates setting forth that said bidder's proposal is genuine and not sham and collusive or made in the interests of or in behalf of any person, firm or corporation not named therein, and that said bidder had not directly or indirectly induced or solicited any other bidder to submit a sham bid or to refrain from bidding or in any manner sought by collusion to secure for himself an advantage over any other bidder [R. 9-10]; that thereafter defendants received awards and entered into said construction work, submitted false and fraudulent written claims for payment, and falsely and fraudulently received from the United States Government, large sums of money, and that the Government of the United States was cheated and defrauded and sustained damages thereby in the amount of $7,620.00 [R. 10]; that the acts of defendants were in contravention of the laws and statutes of the United States, and particularly Sections 80, 83 and 93, of Title 18 of the United States Code Annotated, Revised Statutes, Section 5438 [R. 4-5].

The respondents interposed an answer containing the defenses enumerated in the preliminary statement hereinbefore set forth.

DECISION OF THE DISTRICT COURT.—The district court in its opinion [R. 81-84] and judgment [R. 90] overruled respondents' contention that petitioners' complaint failed to state a cause of action, but maintained respondents' plea of double jeopardy and dismissed petitioners' complaint on that ground.

DECISION OF THE CIRCUIT COURT OF APPEALS.—The circuit court of appeals deliberately failed to decide the question of double jeopardy stating that:

> "there is a divergence of opinion as to what does and what does not constitute double jeopardy in cases of this kind," * * * and preferring "to rest decision upon the contention that the complaint failed to state a claim against the defendants upon which relief could be legally granted under the statutes relied upon. The statutes involved must be strictly construed, and they permit recovery by an informer only when it is shown that the defendants have presented a 'claim upon or against the Government of the United States, or any department or officer thereof knowing such claim to be false, fictitious, or fraudulent.' 31 U. S.C. Sec. 231.
>
> "Nowhere does the informer's complaint charge or allege that any false or fraudulent claim was made to, upon or against the Government of the United States, or any department or officer thereof. * * *" and further that "The successful bidder had no contract with the United States, and the mere fact that the project was financed in part by a federal grant to a state agency in no wise makes the Government of the United States a party to the contract

for purposes of this suit. * * *." "The Board of Administrators of the Charity Hospital of Louisiana, at New Orleans, were the only parties who promised to pay the contractor, and he could look solely to this source of payment. Where the Board of Administrators secured the funds to pay the contractor is not material here. The claim of the defendants was against the Board, they had no claim against the United States, and since no allegation is made in this complaint that a claim had been or could be made by the defendants against the government, this relator was not entitled to recover under these statutes and the complaint should have been dismissed. *United States ex rel Marcus v. Hess*, 3 Circuit, No. 7841, decided March 23, 1942, reaffirmed March 26, 1942, ... F. 2d ....; Cf. *Mandel v. Cooper Corporation*, 42 F. Supp. 317." [R. 118-119.]

Specifications of Errors to Be Urged.

The Circuit Court of Appeals erred:

1. In holding that plaintiffs' complaint failed to charge or allege that any false or fraudulent claim was made to, upon or against the Government or any department or officer thereof.

2. In holding that a right of recovery was not established under the first clause of R.S., Sec. 5438, which makes liable "every person who makes or causes to be made, or presents or causes to be presented, for payment or approval, to or by any person or officer in the civil, military or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent."

3. In holding that the right of recovery was limited to the first clause of R.S., Sec. 5438.

4. In failing to hold that a right of recovery was established under the second clause of R.S., Sec. 5438, which makes liable "every person * * * who, for the purpose of obtaining or aiding to obtain the payment or approval of (any claim upon or against the Government of the United States) makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry."

5. In failing to hold that a right of recovery was established under the third clause of R.S., Sec. 5438, which makes liable "every person * * * who enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim."

6. In affirming the judgment of the district court.

Reasons for Granting Writ.

The circuit court of appeals completely overlooked the fact that the complaint directly and specifically alleges that a false claim was knowingly asserted upon or against the Government. The complaint, in paragraph 15 [R. 10], among other things, alleges that,

> "* * * that all of the aforesaid defendants did falsely and fraudulently submit bids * * * did falsely and fraudulently receive awards and enter into said construction contract in furtherance of said conspiracy, *did submit false and fraudulent written*

claims for payment thereof, did falsely and fraudulently receive from the United States Government large sums of money, and did make or cause to be made false and fraudulent statements or representations in regard to said bids and their claims thereon. and did make or cause to be made or *used false and fradulent certificate or certificates knowing the same to contain false and fraudulent or fictitious statements or entries for the purpose and with the intent of cheating and defrauding the Government of the United States,* and the Government of the United States was cheated and defrauded and sustained damages thereby in the amount of $7,620."

The district court of appeal is therefore in error in stating in its opinion that "nowhere does the informer's complaint charge or allege that any false or fraudulent claim was made upon or against the Government of the United States or any department or officer thereof." The language italicized in the above quotation from petitioners' complaint utilizes almost the identical terminology which the circuit court stated should have been alleged. It is important in this connection to remember that no trial on the merits was ever had in this case and that the district court's holding that "there is no merit in the contention that this action should be dismissed for failure to state a claim upon which relief can be granted" [R. 34] was ruling on a demurrer, and that the circuit court of appeals in reviewing the judgment of the lower court insofar as it decreed that the complaint did state a claim upon which relief could be granted, was reviewing a judgment entered upon the overruling of a demurrer. The principle that a demurrer admits the allegations of the complaint for the purpose of testing its sufficiency,

is too fundamental to require the citation of authority. The principle was as applicable and pertinent upon review of the judgment by the circuit court of appeals as it was upon the ruling by the district court in the first instance. A court in passing upon a demurrer may not concern itself with whether or not the complainant can, at a trial upon the merits, prove the allegations of his complaint, but must accept as true all of the allegations properly pleaded therein.

The circuit court of appeals, in holding the statute to be too narrow to encompass the admitted fraud and injury in the common situation here presented, has severely limited and in large degree emasculated a statute addressed to the cure of a persistent and recurring evil at a time when opportunity and occasion for its violation is increasing. The fact that this is a *qui tam* suit is irrelevant since the rights of the United States suing in its own name under the same statute, R.S., Sec. 3490, could ascend to no greater dignity. The decision, therefore, vitiates the only existing Congressional enactment adequate to make the United States whole on account of frauds depriving it of money or property.

Revised Statute, Sec. 5438, standing alone is merely a criminal statute. But R.S., Sec. 3490, incorporates it and creates in the United States a right to recover double the amount of damages for pecuniary or property loss suffered by reason of fraud in violation of R.S., Sec. 5438, together with a civil penalty of $2,000 for each

such violation. Originally adopted in 1863 when frauds against the Government were prevalent in connection with Civil War contracts, one of its objectives obviously was to reimburse the Government for the heavy expense of investigatio as well as for the loss directly resulting from the fraud. *Cf. Stockwell v. United States*, 13 Wall. 531, 547, 551; *Helevring v. Mitchell*, 303 U. S. 391, 401. No other federal statute thus adequately protects the United States by permitting recovery of double damages. Hence, the decision of the circuit courts of appeals ignores Congressional policy, deprives the United States of a right of recovery sufficient to include the expense of investigation and litigation, abolishes a civil penalty, and nullifies the very purpose of the statute.

But the circuit court of appeals ignored the second and third clauses of the statute altogether, and treated the statute as though it consisted solely of the first clause, saying [R. 118]:

> "The statute involved must be strictly construed and then permit recovery by an informer only when it is shown that defendants have presented a claim upon or against the Government of the United States or any department or officer thereof knowing such claim to be false, fictitious, or fraudulent,"

By narrow and erroneous construction of this language of the first clause it held that no acts in violation of that clause had been alleged. In thus narrowly construing the first clause, and in thus entirely disregarding the second and third clauses, the court below has defeated the plain intention of Congress.

I.

The Narrow Construction of the First Clause of R.S., Sec. 5438 Is Not Warranted by the Terms of the Statute and Is in Conflict With Decisions of the Circuit Courts of Appeals for Other Circuits.

That the claim of the contractor in each instance was a claim against the United States, was alleged in the complaint, as hereinbefore shown by the quotation therefrom. It was alleged (a) that all of the defendants did falsely and fraudulently submit bids; (b) did falsely and fraudulently receive awards and entered into the construction contract; (c) did submit false and fraudulent written claims for payment thereof; (d) did falsely and fraudulently receive from the United States Government large sums of money; (e) did make or cause to be made false and fraudulent statements or representations in regard to said bids and the claims thereon; (f) did make or use or cause to be made or used false and fraudulent certificate or certificates knowing the same to contain false and fraudulent or fictitious statements or entries for the purpose and with the intent of cheating and defrauding the Government of the United States; (g) that the Government of the United States was cheated and defrauded. [R. 10.]

These allegations must be deemed to be true. Thus the situation falls precisely within the plain language of the first clause of R.S., Sec. 5438, imposing liability on "every person who * * * presents or causes to be presented, for payment or approval, to or by any person or officer in the civil * * * service of the United States any claim upon or against the Government of the United

States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent."

The moneys representing that portion of the Federal grant paid out of the Treasury to the local municipalities were earmarked as moneys of the United States, and the account was supervised in every detail by federal officers. (Emergency Relief Appropriation Act of 1935.) In *Madden v. United States*, 80 F. 2d 672 (C. C. A. 1), cert. denied 297 U. S. 710, the court said (p. 676):

> "Defendant contends that there was a fatal variance between the proof and the indictment. His argument is that funds granted by the Federal Emergency Relief Administration to the Emergency Finance Board, a state agency, became state funds and thereafter no title thereto existed in any federal agency and when the Emergency Finance Board transferred part of its funds to the City of Boston for payment of Boston Public Library employees; title to such funds passed to the City of Boston, and thereafter the power of disposition of such funds was in the City of Boston and no Federal agency had any power over them. This contention is not sound. All projects carried on with money derived from the federal government had to be approved by the Federal Administrator. Any diversion of such funds from the project to which they were assigned was a diversion of government money. As hereinbefore stated, all funds allotted by the federal government for the relief of unemployment even though disbursed by state agencies *were earmarked as federal funds, and if diverted from the use for which they were granted it constituted a fraud upon the government.*" (Italics ours.)

In *Langer v. United States*, 76 F. 2d 817 (C. C. A. 8), the court said (p. 823):

> "Appellants next contend that the indictment charges no offense because if the money were money of the United States prior to its being turned over to North Dakota officials, it then ceased to be such, and appellants could not obstruct nor defeat the administration of the federal statutes because they were administering funds belonging to the state, and were not federal officials. In this connection it is urged that it was the intent to pass full and complete title to the money when the Reconstruction Finance Corporation, or the Administrator under the Federal Emergency Relief Act of 1933, loaned it to the state, or otherwise devoted it to the use of the state. Whether the money is granted or loaned by the Reconstruction Finance Corporation or the Administrator under the Federal Relief Act of 1933, *it is money of the Reconstruction Finance Corporation.*" (Italics ours.)

See to the same effect *United States v. Harding*, 65 App. D. C. 161, 81 F. 2d 563, 568.

The holding of the court below presents a conflict with these decisions. Moreover, whatever may have been the arrangement in those decisions, in the present case the complaint clearly alleges that the funds were moneys of and belonged to the United States.

The Circuit Court of Appeals departed from the record in arriving at its decision herein. This is apparent from its language [R. 119] that

> "Indeed, it is without dispute that the contract which was entered into and signed after the submis-

sion of bids was by and between the defendants and the Board of Administrators of the Charity Hospital of Louisiana at New Orleans, a state board or agency. The successful bidder had no contract with the United States, and the mere fact that the project was financed in part by a Federal grant to a state agency in nowise makes the Government of the United States a party to the contract for purposes of this suit. A claim against the United States could not be made by the contractor if he had no contract with the Government and had no right to demand money from it. The Board of Administrators of the Charity Hospital of Louisiana at New Orleans were the only parties who promised to pay the contractor and he could look solely to this source for payment. Where the Board of Administrators secured the funds to pay the contractor is not material here. The claim of the defendants was against the board, they had no claim against the United States, and since no allegation is made in this complaint that a claim had been or could be made by the defendants against the Government, this relator is not entitled to recover under these statutes and the complaint should have been dismissed."

It is obvious from a consideration of the complaint that the matters assumed and considered by the Circuit Court of Appeals were matters *de hors* the record.

Disregarding the fact that the court's conclusion is based upon extraneous matters, it nevertheless is untenable for the reason that it is not necessary that a claim be formally

addressed to th[illegible]. In addition to the fact, as pointed out in *Madden v. United States, supra,* that any diversion of funds from a project to which they were assigned by the Federal Government was a diversion of government money. A claim is just as clearly a claim against the United States when submitted for approval to an officer of the United States so long as it involves a claim against or in derogation of, the pecuniary or property right of the United States. See *United States v. Mercur Corporation,* 83 F. 2d 178, Cert. denied 299 U. S. 576. The first clause of the statute here involved, moreover, in terms includes the presentation of such claims "for payment or approval, to or by any person or officer in the civil * * * service of the United States."

Finally, in its construction of the first clause of the statute, to which it arbitrarily limited its attention, the court below ignored further important and controlling language. Even if it be assumed that these were technically claims against the municipalities rather than against the United States, still the presentation of the contractors' claims to the municipalities, in the words of the first cause of the statute, "causes to be presented" in turn a claim by the municipalities "against the Government of the United States" which the contractors knew "to be false or fraudulent." The facts supporting the cause of action under this portion of the first clause are more fully set forth below in connection with the next point.

II.

The Circuit Court of Appeals Ignored the Second Clause of R.S., Sec. 5438, and Thus Both Nullified the Clearly Expressed Intention of Congress and Deprived the United States of Substantial Rights Under the Statute.

The provisions of R.S., Sec. 5438, evince an intention on the part of Congress to protect the United States against pecuniary loss by fraud, no matter how indirect the cause. The first clause relates to the presentation of a "claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious or fraudulent." The second clause relates to anyone who, for the purpose of *"aiding to obtain"* the payment or approval of a claim against the United States or any department or officer thereof, "makes, uses or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit or deposition, knowing the same to contain any fraudulent or fictitious statement or entry."

Thus, plainly in this second clause Congress intended to reach not the direct presentation of a fraudulent claim against the United States covered by the first clause, but rather a separate and distinct offense: The making or causing to be used of a false claim, certificate, or affidavit—whether or not in itself it be a "claim against the United States"—if such claim, certificate, or affidavit be "for the purpose of obtaining or *aiding to obtain* the payment or approval of a claim against the United States" by another—in this case the municipality. *United States v. Coggin*, 3 Fed. 492, 495; see *United States v. Strobach*, 48 Fed. 902, 909.

Acts by defendants in violation of the second clause of R.S., Sec. 5438, were clearly alleged. The allegations that false "claims" and false "certificates" were made by defendants and caused by them to be used, bring the action within the provisions of the second clause "for the purpose of obtaining or aiding to obtain the payment or approval of" claims upon the Government of the United States. The fact that such claims were made by or through the medium of a municipality, does not alter or affect the ultimate fact. The municipalities, of course, were but the innocent conduits of the fraud of the defendants.

The complaint alleged that the defendants' contracts were based on fraudulent bidding and that included in the bids was a certificate by the bidder that

> "this Proposal is genuine and not sham or collusive, or made in the interest or in behalf of any person, firm or corporation not herein named, and that the undersigned has not directly or indirectly, induced or solicited any other bidder to submit a sham bid, or any other person, firm, or corporation to refrain from bidding and that the undersigned has not in any manner sought by collusion to secure for himself an advantage over any other bidder." [R. 9-10.]

It is clear from the complaint that the defendant contractors made the certificates and that the certificates so made in the language of the statute were "caused to be used" by the defendants against the United States. The complaint specifically alleges that the defendants "did make or use or cause to be made or used false and

fraudulent certificate or certificates knowing the same to contain false and fraudulent or fictitious statements or entries for the purpose and with the intent of cheating and defrauding the Government of the United States, and that the Government of the United States was cheated and defrauded and sustained damages thereby * * *." [R. 10.]

It is axiomatic that the conspirator defendants are presumed to intend the ordinary, natural, probable, or necessary consequence of their voluntary, intentional, and deliberate acts. *United States v. Patten*, 226 U. S. 525, 543; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 243. Accordingly, the allegations of the complaint clearly brought the defendants within the language of the second clause of R. S., Sec. 5438, imposing liability upon anyone "who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim (against the United States) makes, uses or causes to be made or used, any bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition knowing the same to contain any fraudulent or fictitious statement or entry."

The Circuit Court of Appeals, however, failed even to consider whether a cause of action had been alleged under this plainly pertinent language of the second clause of R.S., Sec. 5438. In so doing, the court violated the well-established rule that effect must be given to all parts of a statute. *D. Ginsburg & Sons v. Popkin*, 285 U. S. 204, 208; *McDonald v. Thompson*, 305 U. S. 263, 266.

III.

The Court Below Ignored the Third Clause of R.S., Sec. 5438, Which Imposes Civil Liability Upon Any Person Who Enters Into "Any Agreement, Combination, or Conspiracy to Defraud the Government of the United States" and Pursuant Thereto Presents "Any False or Fraudulent Claim" Whether Against the United States or Against a Third Party So Long as the Effect, as Here, Is to Defraud the United States.

The third clause of R.S., Sec. 5438, evinces still further Congressional intention to assure that the statute would embrace every possible type of fraud in connection with claims paid in whole or part from Federal funds. It was obviously intended to apply where claims in effectuation of the conspiracy are made, whether directly against the United States or against third parties, if the result is to defraud the United States. For, unlike, and in sharp contrast with, the language of the first and second clauses, the word "claim" in the third clause is not limited to those "against the United States." The third clause by its terms embraces "any false or faudulent claim." Since Congress elected to frame three separate clauses, the difference in phraseology in the third clause cannot be disregarded.

Here the conspiracy in the form of collusive bidding, is shown by the complaint and admitted by the demurrer contained in the answer interposed by defendants. The third clause of R.S., Sec. 5438, is directed to any form of joint action "to defraud the Government of the United States" and completely encompasses the joint action of the defendants in defrauding the United States, as specifically alleged in the complaint.

This tangible and pecuniary fraud upon the United States consummated by claims—whether regarded as falling within the first, second, or third clauses of R.S., Sec. 5438—is plainly within the scope of the statute. It is a travesty to assume, as does the court below, that Congress intended to protect against claims presented to federal departments at Washington but not against claims presented to a federal officer or the sponsor of a PWA project at New Orleans, where a fraud involving federal funds results in either instance.

Importance of the Question.

The question here is whether the plain language of the statute is to be judicially limited and in large part nullified. No other legislation confers the right to recover penalties and double damages for frauds in connection with claims against the United States. The pressing need for such a remedy for this specific evil has been recently recognized in this Court. See *United States v. Cooper Corp.*, 312 U. S. 600, 614. Judicial recognition of the plain intent of Congress and the preservation of the remedies and safeguards created by it require that the decision of the court below be brought here for review.

Wherefore it is respectfully submitted that this petition for certiorari should be granted.

Dated July 14, 1942.

BURNETT WOLFSON,
WILLIAM KATZ,
Attorneys for Petitioners.

APPENDIX.

REVISED STATUTES.

Sec. 3491. The several district courts of the United States * * * within whose jurisdictional limits the person doing or committing such act shall be found, shall, wheresoever such act may have been done, or committed, have full power and jurisdiction to hear, try, and determine such suit. Such suit may be brought and carried on by any person, as well for himself as for the United States; the same shall be at the sole cost and charge of such person, and shall be in the name of the United States, but shall not be withdrawn or discontinued without the consent, in writing, of the judge of the court and the district attorney, first filed in the case, setting forth their reasons for such consent.

Sec. 3493. The person bringing said suit and prosecuting it to final judgment shall be entitled to receive one-half the amount of such forfeiture, as well as one-half the amount of the damages he shall recover and collect; and the other half thereof shall belong to and be paid over to the United States; and such person shall be entitle to receive to his own use all costs the court may award against the defendant, to be allowed and taxed according to any provision of law or rule of court in force, or that shall be in force in suits between private parties in said court: *Provided*, That such person shall be liable for all costs incurred by himself in the case, and shall have no claim therefor on the United States.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942.

No. 236

UNITED STATES OF AMERICA ON THE RELATION OF SAMUEL OSTRAGER AND SAMUEL OSTRAGER IN HIS OWN BEHALF

versus

NEW ORLEANS CHAPTER, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., ET AL.

ORIGINAL BRIEF IN BEHALF OF RESPONDENTS.

EBERHARD P. DEUTSCH,
Attorney for Respondents.

R. EMMETT KERRIGAN,
DEUTSCH, KERRIGAN & STILES,
Of Counsel.

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NEW ORLEANS CHAPTER, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., ET AL.

ORIGINAL BRIEF IN BEHALF OF RESPONDENTS.

May It Please the Court:

STATEMENT OF THE CASE.

This action is alleged in the complaint to have been brought under Sections 231 to 235 of Title 31 of the United States Code [R. 2]. In substance, it is based on the allegations that defendant contractors by agreement added certain estimating costs (not alleged to have been excessive) to their respective bids for the construction of the foundation of the Charity Hospital in New Orleans, which was financed in part out of appropriations made by the Federal Emergency Administration of Public Works, and

that the successful bidder returned to the other defendants such estimating costs. The complaint was filed less than two months after the termination of an indictment [R. 25, et seq] consisting of two counts against defendants based on the foregoing transaction. The first count charged defendants with having conspired to defraud the United States in violation of Section 88 of Title 18 of the United States Code; and the second charged defendants with having defrauded the United States by diverting monies allocated out of the Emergency Relief Appropriation Act of 1935, and appropriations supplemental thereto. The first count had been nol prossed and defendants had pleaded *nolo contendere* to the second and had been fined. [R. 59, et seq.]. Paragraph 13 of the complaint [R. 8] is practically a verbatim copy of the substance of count 2 of the indictment [R. 36, 37], indicating that the present action resulted from and is based on the same facts alleged in the indictment.

Defendants filed an answer denying any illegality in the transaction complained of and alleging that such practice was well known, even by the Board of Administrators of the Charity Hospital and its architects.(1)

(1) Defendants in no manner concede the alleged illegality of the practice in question. It is not contended by petitioner, and the complaint does not allege, that the estimating charges were excessive or that there was any agreement or so-called collusion with respect to the final bids submitted by defendants. A service was rendered to the Charity Hospital by each of the contractors who submitted a bid, because each of them was bidding against the other and the probability of the Charity Hospital's obtaining the lowest possible bid was increased by the number of contractors who submitted bids. If a contractor is not reimbursed his estimating charges by the particular work on which the bid is submitted, these charges must be included in bids on subsequent works. It seems proper and fair that each job should bear its own estimating charges, that is, those of all contractors who are furnished plans and specifications and invited to bid thereon. The owner for whom the work is done can limit these charges simply by allowing only a certain number of contractors to submit bids.

Defendants also filed two special defenses, the first being that the complaint failed to state a claim against defendants upon which relief could be granted, and the second that defendants were, contrary to the Fifth Amendment, being twice put in jeopardy for the same offense. These special defenses were brought up for hearing in advance of the trial on the merits. The district court overruled the first defense, without giving any reason for so doing, but maintained the second defense and dismissed the action [R. 81, et seq.]. On appeal the Circuit Court of Appeals affirmed the judgment of the district court, basing its decision primarily on the first defense [R. 114, et seq.]. On petition to this Court certiorari has been granted. No brief has been filed by petitioner.

FAILURE TO STATE A CAUSE OF ACTION.

(a)

As heretofore stated, the complaint alleges that this action is brought under Sections 231, *et seq.* of Title 31 of the United States Code. Apparently when the action was filed petitioner was proceeding under the erroneous provisions of Section 231 of that Title. That Section erroneously provides that a recovery may be had for the commission of acts "prohibited by any of the provisions of Section 80 of Title 18". Section 231 of Title 31 originally was Section 3490 of the Revised Statutes, which provides for the recovery through informers of penalties and forfeitures for the making of false claims against the United States in violation of Section 5438 of the Revised Statutes. When Section 3490 was incorporated into the United States Code in 1926, its reference to Section 5438 was changed by the compilers to read "Section 80 of Title 18", which in-

cluded broad amendments to Section 5438 enacted later than Section 3490.(2) The uniform interpretation of these Sections by the federal courts is to the effect that the informer statute applies only to those offenses which were included within the scope of Section 5438 at the time of its enactment, and may not be extended to include offenses brought within that Section(3) by later amendments.(4)

Inasmuch as petitioner is not entitled to the benefit of the broad provisions of Section 80 of Title 18 of the United States Code, he now contends that the facts alleged in his complaint fall within the narrow provisions of Section 5438 of the Revised Statutes. In this connection it must be borne in mind that informer statutes have been construed with utmost strictness and that informers wishing to recover must adhere to the exact language of the statute.(5)

The pertinent provisions of Section 5438 are as follows;

> "Every person who makes . . . or presents . . . for payment or approval . . . any claim upon or against the Government . . . knowing such claim to be false . . . or who, for the purpose of obtain-

(2) Olson v. Mellon, 4 FS (DC Penna.—1933) 947, aff'd. sub. nom., U. S. ex rel Knight v. Mellon, 71 F2d (CCA 3—1934) 1021; cert. den., 293 US 615.

(3) 18 USC 80.

(4) Olson v. Mellon, supra. See also: United States ex rel Kessler v. Mercur Corporation, 83 F2d (CCA 2—1936) 178, cert. den., 299 US 576; United States v. McMurtry, 5 FS (DC Ky.—1933) 515. To the same effect is an unreported opinion of Judge Knox in the Eastern District of New York: United States v. American Cotton Co-operative Association, L 58/272, May 20, 1935.

(5) Hurst, The Common Informer, 147 Contemporary Review 189, 190; Ferrett v. Atwell, 8 Fed. Cas. No. 4747. Cf. U. S. v. Kansas Pac. Ry. Co., 26 Fed. Cas. No. 15,506; U. S. v. Shapleigh, 54 Fed. (CCA 8—1893) 126.

> ing . . . the payment or approval of such claim, makes . . . any false . . . claim . . . knowing the same to contain any fraudulent or fictitious statement or entry, or who enters into any agreement, combination, or conspiracy to defraud the Government . . . by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim," shall be imprisoned, etc.

The essence of the offense denounced by the foregoing section is the making or presenting of any false or fraudulent "claim upon or against the Government". Unless a complaint charges presentation of such a claim to the Government for payment or approval, no offense is charged under Section 5438, and there is no basis for recovery by an informer under Section 3490. This was conceded by petitioner throughout his brief in the Circuit Court of Appeals,(6) although some attempt has been made to supplement that position in his petition filed for certiorari.

In affirming the judgment of the district court, the Circuit Court of Appeals expressly found that "no allegation is made in this complaint that a claim had been or could be made by the defendants against the government". [R. 118]. An examination of the complaint will disclose the correctness of this finding.

The only allegations of fact set forth in the complaint are those contained in the first fourteen paragraphs thereof [R. 2-10]. A most careful examination of those allegations will disclose that it is not alleged therein that defendants asserted a claim against the Government.

(6) See, for example, pages 15 and 17 of petitioner's opening brief in the Circuit Court of Appeals.

Paragraph 13 of the complaint [R. 8] in effect contains the substance of the demand. The substantial allegations thereof are a verbatim copy of Count 2 of the indictment [R. 35-36], to which defendants pleaded *nolo contendere*. It was conceded(7) by petitioner in his brief in the Circuit Court of Appeals that the indictment did not allege in either count and was not based upon the presentation of a false claim against the Government, and that such an allegation is necessary to maintain the present action. Inasmuch as no such claim was made in the indictment, it follows that no such claim is made in that part of the complaint which is practically a verbatim copy thereof.

In an effort to support the contention that the necessary allegation of the assertion of a false claim against the Government is contained in the complaint, petitioner quoted(8) in his petition for certiorari a *portion* of paragraph 15 [R. 10] of the complaint, which is the concluding paragraph thereof. However, an examination of that paragraph will show that no additional facts are set forth therein. The allegations thereof are simply conclusions of law expressly based upon the preceding allegations of fact. Thus, the conclusions alleged in that paragraph are prefaced with the following statement which is omitted from the quotation in the petition for certiorari:

> "That pursuant to the aforesaid conspiracy and in furtherance thereof, all of the aforesaid defendants *through the fraudulent and unlawful conduct hereinbefore described, did* . . . " [R. 10].

(7) P. 15 of petitioner's opening brief in the Circuit Court of Appeals.

(8) Pages 12-13, petition for certiorari.

Although the motion under discussion admits well pleaded facts, it does not admit averments of the pleader's conclusions.(9) But even if the conclusions of the pleader in paragraph 15 of the complaint are to be given effect, the requisite allegation of a false claim against the Government cannot be found therein. Although those conclusions state that defendants "did falsely and fraudulently receive from the United States Government large sums of money", and that defendants had committed various acts "for the purpose and with the intent of cheating and defrauding the Government of the United States", no allegation is made that any false claim was asserted against the Government.

It may be contended that the requisite allegation is found in the following portion of paragraph 15: "did falsely and fraudulently submit bids in furtherance of said conspiracy, did falsely and fraudulently receive awards and enter into said construction contract in furtherance of said conspiracy, did submit false and fraudulent written claims for payment thereof". But these allegations obviously refer to the construction contract with the Board of Administrators of the Charity Hospital referred to in paragraph 9 [R. 6] of the complaint. As will be pointed out hereinafter, claims made under this contract with the Board of Administrators did not constitute claims against the Government.

(9) Newport News, etc. Co. v. Schauffler, 303 U. S. 54; Nortz v. United States, 294 U. S. 317; St. Louis, K. & S. E. R. Co., v. United States, 267 U. S. 346; United States ex rel Salzman v. Salant, 41 F. S. (DC NY—1938) 196.

It was asserted(10) in the petition for certiorari herein that the Circuit Court of Appeals departed from the record in arriving at its decision, and a portion of the Court's opinion is quoted in support of this assertion. Apparently this contention refers to the Court's statement that the contract for the construction in question was entered into with the Board of Administrators of the Charity Hospital, and that the successful bidder had no contract with the United States. This statement is in absolute keeping with the allegations of the complaint and with the theory on which the case has been prosecuted in the two courts below. The complaint clearly set forth that the bids for the work were submitted to the Board of Administrators and that the contract therefor was with such board. The allegations that the project "was financed in part" by the Federal Emergency Administration of Public Works and that the grant to the Board of Administrators was "for the purpose of aiding said project," do not set forth that the bids were submitted to, or the contract for the work was executed with, the Government. These allegations simply show that the Government partially financed the cost of the work.

Even if the complaint alleged that the construction contract was obtained through fraudulent representations, such allegation would not state a cause of action within the provisions of Section 5438 of the Revised Statutes. The recent case of *Mandel v. Cooper Corporation*,(11) has clearly held that such a transaction, even with the United

(10) Pages 18-19.

(11) 42 FS (DC NY—1941) 317.

States itself, does not constitute the making of a fraudulent claim within the informer statute.

A claim against the United States means "a right to demand money from the United States".(12) In *United States v. Cohn*,(13) this Court, in passing on Section 5438, said:

> ". . . it is clear, in the light of the entire context, that in the present statute, the provision relating to the payment or approval of a 'claim upon or against' the Government relates solely to the payment or approval of a claim for money or property to which a right is asserted against the Government, *based upon the Government's own liability to the claimant.*" (Italics supplied).

The present complaint does not allege liability of the Government for the amount due under the construction contract, nor is there any allegation that the Government was liable to the successful bidder or to any of the defendants. There being no such alleged liability and no right of defendants to demand any amount under the construction contract, or otherwise, from the Government, and there being no allegation that any claim was asserted by defendants against the Government, this action is not authorized by the informer statute, and the decision of the Circuit Court of Appeals so holding, is correct.

All of the authorities cited by petitioner were cases involving criminal prosecutions under sections of the crim-

(12) Hobbs v. McLean, 117 U. S. 567, 575; Words & Phrases, Vol. 7, 392. See also: United States ex rel. Kessler v. Mercur Corp., supra; United States ex rel. Salzman v. Salant, supra; United States v. American Cotton Cooperative Ass'n., supra.

(13) 270 U. S. 339, cited with approval in United States v. Kapp, 302 U. S. 214. Also see: Mookini v. United States, 95 F2d (CCA 9—1938) 960; United States ex rel. McMurtry, supra, and cases cited in the preceding footnote.

inal code imposing penalties for *defrauding* the United States.(14) These cases are based primarily on the decisions of this Court giving a broad interpretation to such statutes.(15)

Petitioner's contention, not urged in either of the courts below, that the second and third clauses of Section 5438 are broad enough to include the claim asserted in the complaint, is indeed novel, never before having been asserted in the many years the statute has been in force, and is without foundation.

The contention with respect to the second clause of the statute is based on the allegations in paragraph 14 of the complaint [R. 9-10] with reference to the execution of certificates by defendants at the time they submitted their respective bids to the Board of Administrators of the Charity Hospital. Although the allegations of this paragraph were denied in the answer [R. 17] they must be taken for true under the motion under consideration.

A fair interpretation of the alleged certificates should not render them false under the circumstances. But even if the certificates should be declared false under the allegations of the complaint, it is not alleged that they

(14) Madden v. United States, 80 F2d (CCA 1—1935) 672, cert. den., 297 U. S. 710; Langer v. United States, 76 F2d (CCA 8—1935) 817; United States v. Harding, 81 F2d (Ct. Ap. DC—1936) 563.

(15) "It is not necessary that the government shall be subjected to property or pecuniary loss by the frauds, but only that its legitimate official action and purpose shall be defeated by misrepresentation, chicane or the overreaching of those charged with carrying out the governmental intention." Hammerschmidt v. United States, 265 U. S. 182, 188; See also Haas v. Henkel, 216 U. S. 462.

were used "for the purpose of obtaining or aiding to obtain the payment or approval" of a "false, fictitious or fraudulent" claim "upon or against the Government of the United States" as required by the second clause of the statute. Paragraph 14 of the complaint merely alleges that these certificates were made "for the purpose and with the intent of cheating and defrauding the Government of the United States."

If it is petitioner's contention that the certificates were executed for the purpose of obtaining payment of a "claim" of the Board of Administrators of the Charity Hospital against the United States, the contention is groundless because there is no allegation that any such claim of the Board of Administrators was "false, fictitious or fraudulent".

With respect to the third clause of the statute, it is quite obvious that the "false or fraudulent claim" referred to therein is one upon or against the United States, as are the other claims previously referred to in the statute. All of the cases dealing with the statute have held or indicated that an informer can recover only in the event a false claim is asserted against the Government. Petitioner's contention with respect to this clause of the statute appears to be an afterthought.(16)

(16) "The indictment does not allege in either count and is not based upon the presentation of a false claim for payment or approval against the United States Government or an agency thereof. Such an allegation is necessary, however, to maintain a cause of action under 31 U.S.C.A. 231 (R. S. 3490) which incorporates Sections 80 and 83 (R. S. 5438) of Title 18, U.S.C.A., insofar as the enumerated offenses are concerned." P. 15 of petitioner's opening brief in the Circuit Court of Appeals.

As heretofore pointed out, the complaint is expressly based on Section 80 of Title 18 of the United States Code(17) which contains broad amendments to the original Section 5438 of the Revised Statutes. While the provisions of Section 80 may be broad enough to allow a prosecution under the circumstances alleged in the complaint, those broad provisions are not applicable to the informer statute, and petitioner must bring his action within the narrow provisions of Section 5438, as originally enacted, which he has failed to do.

(b)

The complaint fails to show that petitioner has obtained the authority of the Commissioner of Internal Revenue for the institution of this action. Section 3214 of the Revised Statutes requires the Commissioner's authority for commencement of a suit "for the recovery of taxes, or of any fine, penalty or forfeiture". The same section further provides "That in case of any suit for penalties or forfeitures brought upon information received from any person other than a collector or deputy collector, the United States shall not be subject to any costs of suit."

The preceding Section 3213 provides that "All suits for fines, penalties and forfeitures where not otherwise provided for, shall be brought in the name of the United States, in any proper form of action, or by any appropriate form of proceeding, *qui tam* or otherwise . . .". These provisions of Section 3213, together with those of Section 3214, above quoted, indicate that the authorization of the

(17) 18 U.S.C. 80.

Commissioner of Internal Revenue is required not only for the institution of a suit for the recovery of taxes but also for any penalty or forfeiture due under the informer statute. Such a conclusion was reached in the case of *Olson v. Mellon, supra.*(18)

DOUBLE JEOPARDY.

If the first defense is not maintained, it is submitted that the defense of double jeopardy must of necessity be maintained because the offense here charged is the same as that contained in count 2 of the indictment on which defendants were fined, and because the sanction sought to be imposed is a criminal one.

There does not seem to be any question but that the offense charged in the complaint and that charged in the second count of the indictment, on which defendants were punished, are the same. As heretofore pointed out, paragraph 13 of the complaint, which contains the substance of petitioner's action, is practically a verbatim copy of count 2 of the indictment. [R. 36]. As stated succinctly by the district judge in his opinion, the "offense alleged in the complaint and that alleged in the second count of the indictment are really one and the same; that is, that the United States was defrauded by additions made to the bids for the construction of the foundation of the Charity Hospital". [R. 83]. It seems quite clear that the facts alleged in count 2 of the indictment and which could

(18) "We know of no rule in relation to the construction of statutes which takes the instant cases out of the purview of Section 3214 Rev. St." Olson v. Mellon, supra, at p. 950.

have been proved thereunder are the same as those set forth in the complaint and which could be proved thereunder.(19)

The double jeopardy clause of the Constitution protects the imposition of more than one criminal sanction for the same act or omission.(20) There is no prohibition against the imposition of both criminal and civil sanctions for the same act. The question of whether a criminal or a civil sanction is sought to be imposed is entirely one of statutory construction.(21)

In *Helvering v. Mitchell, supra*, the Court found that the intention of Congress to impose a civil sanction by imposing "additions" to the income tax was made clear by the express language of the statute under consideration. The Court pointed out that under the statute the additions as well as the tax itself could be collected by distraint or by a proceeding in court. This provision of the statute would have been unconstitutional if the sanction in question had been a criminal one because Congress may not provide civil procedure for the enforcement of punitive sanctions. Inasmuch as the court was bound to give a constitutional interpretation to the statute if possible(22), it was required

(19) "We are, therefore, of opinion that if the specific acts of removal on which this suit is brought are the same which were proved in the indictment, the former judgment and conviction is a bar to the present action. . . ." United States v. McKee, 26 Fed. Cas. (CC Mo.—1877) 116, No. 15688; cited with approval in Coffey v. United States, 116 U. S. 436, and U. S. v. LaFranca, 282 U. S. 568.

(20) Helvering v. Mitchell, 303 U. S. 391.

(21) Helvering v. Mitchell, supra; Murphy v. United States, 272 U. S. 630,

(22) Cf. United States v. LaFranca, supra.

to hold that Congress intended merely a civil sanction. Thus the Court said:

> "If the section provided a criminal sanction, the provision for a collection by distraint would make it unconstitutional. . . . That Congress provided a distinctly civil procedure for the collection of the additional fifty per centum indicates clearly that it intended a civil, not a criminal sanction."

In addition to the foregoing provisions of the statute, the Court pointed out that the addition to the tax was not included in the part of the act headed "Penalties" but in the part headed "Additions to the Tax". The Court also pointed out that included under the latter heading were other sections, one providing for "25 per centum addition for failure to make and file a return"; another providing for "interest at the rate of 6 per cent. upon the deficiency from the date prescribed for payment of the tax," etc. After making these observations, the Court concluded:

> "Obviously all of these 'Additions to the Tax' were intended by Congress as civil incidents of the assessment and collection of the income tax."

In the instant case there is no provision of the statute which must be interpreted as applying a civil sanction in order to save its constitutionality, nor is the penalty prescribed clearly denominated as a civil sanction. The statute clearly provides for punishment, and it has so been interpreted.

Thus, in *United States v. Shapleigh*,(23) the court said that under the statute "the Government sought to

(23) 54 F. 126.

punish this defendant" and that the proceeding thereunder was "*criminal in its . . . purpose*". In *Olson v. Mellon, supra*, the court said that "The statute is *plainly penal* in its nature. . .". Although the statute considered in *United States v. LaFranca, supra*, was not the one now under consideration, the language used by the Court there is significant:(24)

> "But an action to recover a penalty for an act declared to be a crime is, in its nature, *a punitive proceeding*, although it take the form of a civil action; and the word 'prosecution' is not inapt to describe such an action." (Italics supplied).

Section 3492, which is the third section of the informer statute, provides as follows:

> "And such person may be arrested and held to bail in such sum as the district judge may order, not exceeding the sum of two thousand dollars, and twice the amount of the damages sworn to in the affidavit of the person bringing the suit."

The foregoing is indeed an expression of Congress that the purpose of the statute is to punish. It would seem quite clear that one would not be "held to bail" in a proceeding to enforce a mere civil sanction.

Inasmuch as there is no clear indication in the statute of the intention of Congress to impose a civil sanction, the express provisions of the statute and the interpretations thereof and of similar statutes should lead to the conclusion that a criminal and not a civil sanction was intended thereunder. Such being the case, the plea of

(24) Cf. Coffey v. United States, supra.

double jeopardy must be sustained in the event the first defense is overruled. The fact that the defendants in the instant case were not actually tried but simply were fined on pleas of *nolo contendere* does not alter the rule.(25)

CONCLUSION.

On the basis of the foregoing reasons and authorities, defendants respectfully urge that the judgment be affirmed.

Respectfully submitted,

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DEUTSH, KERRIGAN & STILES,
Of Counsel.

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(25) United States v. Chouteau, 102 U. S. 603, cited with approval in United States v. LaFranca, supra; United States v. Glidden Co., 78 F2d (CCA 6—1935) 639, cert. den., 296 U. S. 652.

SUPREME COURT OF THE UNITED STATES.

No. 236.—October Term, 1942.

United States of America on the Relation of Samuel Ostrager and Samuel Ostrager in his own behalf, Petitioners,
vs.
New Orleans Chapter, Associated General Contractors of America, Inc., et al.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[January 18, 1943.]

Mr. Justice Black delivered the opinion of the Court.

This action is substantially similar to that in *United States ex rel. Marcus* v. *Hess*, — U. S. —, decided this day. Relying on §§ 5438 and 3490-93, Revised Statutes, the petitioner charges that the respondents caused the government $7,620 damages by submitting fraudulent collusive bids on a hospital constructed with Federal Public Works Administration financial assistance. The petitioner in a qui tam action asks double damages plus $2,000 from each of seventeen respondents. The respondents had previously been indicted by the United States government in a criminal action and had paid fines totalling $5,000.

The respondents answered on the merits, made other pleadings not relevant at this stage of the case, and offered two special defenses: that the action placed them in double jeopardy in violation of the Fifth Amendment and that the statutes involved did not provide a basis for such a cause of action. The district court, without reaching the merits, dismissed the complaint on the theory of double jeopardy. The Circuit Court of Appeals affirmed the dismissal of the complaint but rested its conclusion on the belief that no claim against the United States was involved since the United States was not a party to the contract. It relied heavily on the *Hess* case as decided by the Circuit Court.

For the reasons set forth in our opinion in the *Hess* case, we believe that the decision below should be reversed.

It is so ordered.

Mr. Justice Frankfurter joins in this opinion but concurs on the question of double jeopardy for the reasons set forth in his opinion in No. 173, *United States ex rel. Marcus* v. *Hess*. Mr. Justice Jackson dissents for the reasons set forth in his opinion in the same case.

Mr. Justice Murphy took no part in the consideration or disposition of this case.